

**DOCKET**

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

PROCEEDINGS AND ORDERS

DATE: 050186

CASE NBR 85-1-01038 CFX  
SHORT TITLE Euroquilt, Inc., etc.  
VERSUS Scandia Down Corp., etc.

DOCKETED: Dec 12 1985

Date	Proceedings and Orders
Dec 12 1985	Petition for writ of certiorari filed.
Jan 16 1986	Waiver of right of respondent Scandia Down Corp. to respond filed.
Jan 22 1986	DISTRIBUTED. February 21, 1986
Feb 28 1986	Response requested.
Mar 31 1986	Brief of respondents Scandia Down Corp., et al. in opposition filed.
Apr 2 1986	REDISTRIBUTED. April 18, 1986
Apr 11 1986	Reply brief of petitioner Euroquilt, Inc., etc. filed.
Apr 21 1986	REDISTRIBUTED. April 25, 1986
Apr 28 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) *****

**PETITION  
FOR WRIT OF  
CERTIORARI**

DEC 12 1985

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

EUROQUILT, INC., a New Jersey corporation,

*Petitioner,*

v.

SCANDIA DOWN CORPORATION,  
a California corporation, and  
GOOSE DOWN, INC., an Illinois corporation,*Respondents.***PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**CARL E. MOORE, JR.  
MARSHALL, O'TOOLE, GERSTEIN  
MURRAY & BICKNELLTwo First National Plaza  
Suite 2100

Chicago, Illinois 60603

(312) 346-5750

*Attorney for Petitioner*



**I.****Questions Presented**

1. Is a trial court determination that there is a likelihood of confusion between a trademark and allegedly infringing marks a question of pure fact, reversible only if clearly erroneous?

The question arises because the Seventh Circuit declined to follow precedents of the Federal Circuit, which have held likelihood of confusion to be a conclusion of law, and affirmed as not clearly erroneous the District Court's determination that there is a likelihood of confusion between Petitioner's various logos for goose down-containing products and Respondents' common law trademark depicting a goose and the words "Scandia Down Shops".

2. Is a finding of contempt proper in a trademark infringement action against a preliminarily enjoined defendant who uses a mark that the plaintiff disclaimed in its motion for preliminary injunction?

This question arises because Petitioner was found in contempt of a preliminary injunction for using a mark that Respondents had argued in their successful motion for a preliminary injunction was not being challenged.

**Parties to Proceedings Below**

Petitioner here and Defendant/Appellant below is Euroquilt, Inc., a New Jersey corporation. Respondents here and Plaintiffs/Appellees below are Scandia Down corporation, a California corporation, and Goose Down, Inc., an Illinois corporation.

## II.

## TABLE OF CONTENTS

	PAGE
Questions Presented .....	i
Table of Contents .....	ii
Table of Authorities .....	iii
Opinions Below .....	1
Jurisdiction .....	2
Statutes Involved .....	2
Statement of the Case .....	3
a. Jurisdiction and Procedural Background .....	3
b. Factual Background .....	3
c. The Appeal to the Seventh Circuit .....	6
Reasons for Granting the Petition .....	8
I. Appellate Review Should be Plenary .....	8
II. The Second Finding of Contempt Violated F.R. Civ. Pro. 65(d) .....	12
Conclusion .....	17
Appendix	
A. Opinion of the Seventh Circuit, 772 F.2d 1423 (1985) .....	1a
B. District Court Opinion Upon Issuance of Prelimi- nary Injunction, 220 USPQ 1050 (1982) .....	17a
C. District Court's Memorandum Opinion Dated May 31, 1984 (with Adopted Findings of Fact) .....	25a
D. Excerpt from Plaintiffs'/Respondents' Brief in Support of Their Motion for Preliminary In- junction .....	50a
E. Excerpt from Trial Transcript (October 28, 1983) ..	53a
F. Statutes Involved .....	55a

## III.

## TABLE OF AUTHORITIES

	PAGE
<i>American Aloe Corp. v. Aloe Creme Laboratories, Inc.</i> , 420 F.2d 1248 (7th Cir. 1970) .....	10
<i>Arthur Retlaw &amp; Associates, Inc. v. Travenol Laboratories, Inc.</i> , 582 F.Supp. 1010 (N.D. Ill. 1984) .....	13
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) .....	9
<i>Bowie v. Columbia</i> , 378 U.S. 347 (1964) .....	14
<i>Brunton v. Superior Court of Los Angeles County</i> , 20 Cal. 2d 202, 124 P.2d 831 (1942) .....	16
<i>Burger King of Florida v. Hoots</i> , 403 F.2d 904 (7th Cir. 1968) .....	13
<i>California Artificial Stone Paving Co. v. Molitor</i> , 113 U.S. 609 (1985) .....	15
<i>Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.</i> , 459 U.S. 916 (1982) .....	9
<i>Fleetwood Co. v. Hazel Bishop, Inc.</i> , 352 F.2d 841 (7th Cir. 1965) .....	10
<i>Fuji Photo Film v. Shinohara Shaji Kabushiki Kaisha</i> , 754 F.2d 591 (5th Cir. 1985) .....	8
<i>Giant Food, Inc. v. Nation's Foodservice, Inc.</i> , 710 F.2d 1565 (Fed. Cir. 1983) .....	8
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966) .....	11
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters</i> , 415 U.S. 423 (1974) .....	12, 15
<i>Henri's Food Products Company, Inc. v. Kraft, Inc.</i> , 717 F.2d 352 (7th Cir. 1983) .....	10
<i>Hot Shot Quality Products, Inc. v. Sifers Chemicals, Inc.</i> , 452 F.2d 1080 (10th Cir. 1971) .....	8

	PAGE
<i>Jellibeans Inc. v. Skating Clubs of Georgia, Inc.</i> , 716 F.2d 833 (11th Cir. 1983).....	8
<i>John O. Butler Co. v. Oral B. Co.</i> , 185 USPQ 594 (N.D. Ill. 1975).....	10
<i>KSM Fastening Systems, Inc. v. H.A. Jones Com- pany, Inc.</i> , ____ F.2d ____, 227 USPQ 676 (Fed. Cir. 1985).....	14, 15
<i>Kimberly-Clark Corp. v. H. Douglas Enterprises</i> , 774 F.2d 1144 (Fed. Cir. 1985) .....	9
<i>Kwik-Site Corp. v. Clear View Mfg. Co., Inc.</i> , 758 F.2d 167 (6th Cir. 1985) .....	9
<i>Lindy Pen Co., Inc. v. Bic Pen Corp.</i> , 725 F.2d 1240 (9th Cir. 1984), <i>cert. denied</i> ____ U.S. ____, 105 S. Ct. 955, 83 L.Ed.2d 962 (1985).....	9
<i>Litton Systems, Inc. v. Whirlpool Corp.</i> , 728 F.2d 1423 (Fed. Cir. 1984) .....	11
<i>Miller v. Fenton</i> , 54 U.S.L.W. 4022 (Dec. 3, 1985) .....	9
<i>Piper Aircraft Corp. v. Wag-Aero, Inc.</i> , 741 F.2d 925 (7th Cir. 1982) .....	10
<i>Pizzeria Uno Corp. v. Temple</i> , 747 F.2d 1522 (4th Cir. 1984) .....	8
<i>Plus Products v. Plus Discount Foods, Inc.</i> , 722 F.2d 999 (2nd Cir. 1983).....	8
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982) ...	9, 12
<i>Purolator, Inc. v. Efra Distributors, Inc.</i> , 687 F.2d 554 (1st Cir. 1982) .....	8
<i>Scott Paper Co. v. Scott's Liquid Gold, Inc.</i> , 589 F.2d 1225 (3rd Cir. 1978) .....	9
<i>Steem-Electric Corp. v. Herzfeld-Phillipson Co.</i> , 118 F.2d 122 (7th Cir. 1940).....	10

	PAGE
<i>Stratoflex, Inc. v. Aeroquip Corp.</i> , 713 F.2d 1530 (Fed. Cir. 1983) .....	11
<i>WSM, Inc. v. Hilton</i> , 724 F.2d 1320 (8th Cir. 1984).....	8

## TREATISES

4 Callmann, <i>The Law of Unfair Competition, Trademarks and Monopolies</i> (4th Ed. 1983) § 22.46.....	14
§ 23.5.....	11
2 J. McCarthy, <i>Trademarks and Unfair Com- petition</i> , § 23.22 (2nd Ed. 1984) .....	11

## STATUTES

Section 43 (a) of the Lanham Act (15 U.S.C. § 1125 (a)).....	3
Federal Rule of Civil Procedure 52(a) .....	7
Federal Rule of Civil Procedure 65 (d) .....	12, 15

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

---

EUROQUILT, INC., a New Jersey corporation,

*Petitioner.*

v.

SCANDIA DOWN CORPORATION,

a California corporation, and

GOOSE DOWN, INC., an Illinois corporation,

*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

**Opinions Below**

There are three opinions below, two of which have been officially reported:

(a) The opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court's May 31, 1984 order. It is set forth in Appendix A. 772 F.2d 1423.

(b) The opinion of the United States District Court for the Northern District of Illinois granting Respondents' motion for a preliminary injunction, set forth in Appendix B. 220 USPQ 1050 (1982).

(c) The memorandum, unreported opinion dated May 31, 1984 of the United States District Court for the Northern District of Illinois adopting proposed findings of the plaintiff and magistrate, granting a permanent injunction against Petitioner, and finding Petitioner in contempt of the preliminary injunction. The memorandum opinion is set forth in Appendix C along with the proposed findings.

#### **Jurisdiction**

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 13, 1985. The jurisdiction of the United States Supreme Court is invoked under the provisions of Title 28, United States Code, § 1254(1).

#### **Statutes Involved**

Section § 43a of The Lanham Trademark Act of 1946, 15 U.S.C. § 1125a.

Federal Rule of Civil Procedure 65(d).

These provisions are set forth in Appendix F.

### **Statement of the Case**

#### **a. Jurisdiction and Procedural Background**

The federal courts have jurisdiction of this case pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338 (21a).

The Respondents, Scandia Down Corporation and Goose Down, Inc. ("Scandia"), which market bedding products such as down-filled comforters under the common law trademark "Scandia Down Shops", brought suit against Petitioner, Euroquilt, Inc. ("Euroquilt") based upon asserted violations of § 43(a) of the Lanham Act (15 U.S.C. § 1125(e)), violations of two state statutes, Ill.Rev.Stat. ch. 121 ½ and ch. 140, and common law unfair competition. A preliminary injunction was granted by the District Court (220 USPQ 1050, Appendix B). After a trial where Petitioner's president appeared *pro se*, the District Court issued a permanent injunction and held Petitioner in civil contempt for two violations of the preliminary injunction (Appendix C). The Court of Appeals affirmed the District Court in all respects. (772 F.2d 1423, Appendix A).

Petitioner seeks review of the judgment of the U.S. Court of Appeals for the Seventh Circuit (Appendix A).

#### **b. Factual Background**

The facts pertinent to this petition are uncomplicated. Euroquilt and Scandia are competitors in the market for down bedding products (25a), including products such as down comforters (1a). The principal competitive overlap during the relevant period occurred in New York and Chicago, where each party had one or more stores (1a, 41a).

Scandia has used the common law trademark represented below, since 1976 (25a).





Logo I

Starting prior to 1976 (27a) and until 1982 (41a), Euroquilt occasionally put a sign with the words "The Down Shoppe" in one or more of its stores, but generally marketed its products under the names "Euroquilt" or "Continental Quilt" (25a). In April, 1982, Euroquilt began using the logo represented below:



Logo II (2a)

The introduction of Logo II prompted Scandia to bring suit in November, 1982 (2a). In its motion for a preliminary injunction, Scandia emphasized that it was seeking to enjoin only the combination of a picture of a goose plus the words "Down Shop(pe)" (50a-52a). The preliminary injunction issued by the District Court prohibited the use of Logo II "or any colorable imitation thereof" (24a).

After issuance of the preliminary injunction, Euroquilt switched to a different logo, although the typeface (called "Souvenir Bold") and some words remained the same:



Logo III (2a)

Scandia objected almost immediately to Logo III, whereupon Euroquilt promptly switched to the logo presented below:



Logo IV (3a)

Scandia charged that Logo IV was a violation of the injunction (3a). After finding a likelihood of confusion between Logo I and Logo IV, a magistrate recommended on September 2, 1983 that Euroquilt be held in contempt (3a).

While the magistrate's recommendation was pending, a trial was held on Scandia's request for a permanent injunction (3a). Euroquilt was not represented by counsel at trial (26a). At trial, Scandia emphasized that it was not trying to proscribe Euroquilt from use of the descriptive words "Down Shop(pe)", but only those words in combination with other symbols or words that could create confusion (54a).

After trial and pending the District Court's decision, Euroquilt fell back to a logo without any picture of a goose:

# The Down Shoppe

## Logo V (3a)

Scandia objected also to the use of this logo, however, and moved on February 22, 1984 that Euroquilt be held in contempt for the second time (3a).

In an opinion dated May 31, 1984, the District Court found Euroquilt guilty of two instances of civil contempt of the preliminary injunction (29a). The Court also issued a permanent injunction against the use of Logos III-V (30a). Before the magistrate and at trial, substantial evidence of actual consumer confusion between the goods and stores of Scandia and Euroquilt was presented, confusion which the District Court attributed to the use of Logos II and IV (27a). The District Court also found that Euroquilt had intended to infringe Scandia's mark (13a). Based largely on such findings, Logo V was enjoined (along with the other logos) to ensure that Euroquilt, having just been found in contempt for use of Logo IV, stayed a "safe distance" from Scandia's logo (28a). The District Court also found Euroquilt guilty of a second instance of civil contempt for the use of Logo V (29a).

## c. The Appeal to the Seventh Circuit

Euroquilt raised a number of issues on appeal, including the two questions presented by this petition. Euroquilt argued that the District Court's finding of a likelihood of confusion between Logo I (on the one hand) and Logos II and IV (on the other) was, under Seventh Circuit precedents, a mixed

question of fact and law not subject to the clearly erroneous standard of Fed. Rule Civ. Pro. 52(a) (6a). Second, Euroquilt argued that holding it in contempt for the use of Logo V violated Fed. Rule Civ. Pro. 65(d) (13a-15a).

In the opinion affirming the District Court, Judge Easterbrook, writing for the Seventh Circuit, rejected both of Euroquilt's contentions in the course of affirming the District Court's order. With respect to the first issue, the Court of Appeals confirmed adherence to the clearly erroneous standard, stating flatly that "the question of likelihood of confusion is all fact and no law" (6a). With respect to the issue of the second holding of contempt, Judge Easterbrook agreed with the District Court that the first finding of contempt (with respect to Logo IV) permitted a second finding of contempt (in the use of Logo V), even though such use of Logo V without a predicate finding of contempt would probably not have constituted contempt by itself (15a).

## REASONS FOR GRANTING THE PETITION

Certiorari should be granted in order:

1. To resolve a conflict among the Courts of Appeals concerning the appropriate standard for appellate review of a trial court finding of likelihood of confusion in a trademark infringement case.

2. To provide guidance concerning the application of Fed. Rule Civ. Pro. 65(d)'s requirement of fair notice to an enjoined party in an intellectual property infringement action.

### I. APPELLATE REVIEW SHOULD BE PLENARY

Judge Easterbrook recognized that the Court of Appeals' decision to treat likelihood of confusion as subject to the clearly erroneous standard was in direct conflict with several opinions of the U.S. Court of Appeals for the Federal Circuit, e.g., *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569 (Fed.Cir. 1983) (7a). The conflict is not limited to those two Courts of Appeals, however.

According to Petitioner's legal research, six Courts of Appeals have taken the position adopted by the Seventh Circuit in this case, viz, that likelihood of confusion is reviewable under the clearly erroneous standard. See, e.g., *Purolator, Inc. v. Efra Distributors, Inc.*, 687 F.2d 554, 559 (1st Cir. 1982); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526, 1536 (4th Cir. 1984); *Fuji Photo Film v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 595 (5th Cir. 1985); *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1329 (8th Cir. 1984); *Hot Shot Quality Products, Inc. v. Sifers Chemicals, Inc.*, 452 F.2d 1080, 1081 (10th Cir. 1971); *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 839-40 (11th Cir. 1983).

By contrast, five Courts of Appeals have adopted a position contrary to that held by the Seventh Circuit below. See, e.g., *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1004-

05 (2d Cir. 1983); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229-30 (3d Cir. 1978); *Kwik-Site Corp. v. Clear View Mfg. Co., Inc.*, 758 F.2d 167, 178 (6th Cir. 1985); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1243 (9th Cir. 1984), cert. denied \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 955, 83 L.Ed. 2d 962 (1985); *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 1166 (Fed. Cir. 1985).

This split in the circuits has not escaped attention. Justice White has previously dissented from a denial of certiorari in a case that would have permitted this Court to resolve the conflict. See *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, 459 U.S. 916 (1982).

At the root of this circuit disagreement is what this Court has termed "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard v. Swint*, 465 U.S. 273 (1982); See also *Miller v. Fenton*, 54 U.S.L.W. 4022, 4025 (December 3, 1985). As this Court noted in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1960 n.17, 80 L.Ed. 2d 502 (1984):

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue.

Petitioner respectfully suggests that a determination of whether confusion between marks is likely goes beyond "the application of those ordinary principles of logic and common experience". The transcendence of pure fact arises in part from the legal requirement to disregard certain contributors to confusion before reaching a conclusion as to whether there is a likelihood of confusion between the marks in this case. Under



applicable precedents in the Seventh Circuit, any confusion in the marketplace attributable to use of the descriptive words "Down Shop(pe)" is not probative of a likelihood of confusion between the marks of Scandia and Euroquilt. See *John O. Butler Co. v. Oral B. Co.*, 185 USPQ 594, 596 (N.D. Ill. 1975) and cases cited therein; see also *American Aloe Corp. v. Aloe Creme Laboratories, Inc.*, 420 F.2d 1248, 1256 (7th Cir. 1970) (TAN LIFE does not infringe FASHION TAN or AFTER TAN); *Fleetwood Co. v. Hazel Bishop, Inc.*, 352 F.2d 841, 844 (7th Cir. 1965) (TINTSTIK does not infringe TINTZ STICK); *Steem-Electric Corp. v. Herzfeld-Phillipson Co.*, 118 F.2d 122, 127 (7th Cir. 1940) (STEAM-O-MATIC does not infringe STEEM-ELECTRIC).

Moreover, the Seventh Circuit has required District Courts to consider *all* factors relevant to the likelihood of confusion, and has reversed when excessive importance is placed on one or more factors. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 934 (1982).<sup>1</sup> Among the factors to be weighed is the presence of the manufacturer's name in a mark, *viz.* "Scandia" in Logo I and "Continental Quilt" in Logo IV, which tends to reduce the likelihood of confusion. See *Henri's Food Products*

<sup>1</sup> The Seventh Circuit in *Piper Aircraft* identified seven factors relevant to the question of whether a likelihood of confusion exists between marks:

"To establish likelihood of confusion, we have identified a number of factors:

- (1) the degree of similarity between the marks in appearance and suggestion;
- (2) the similarity of the products for which the name is used;
- (3) the area and manner of concurrent use;
- (4) the degree of care likely to be exercised by consumers;
- (5) the strength of the complainant's mark;
- (6) actual confusion; and
- (7) an intent on the part of the alleged infringer to palm off his products as those of another.

None of these factors is determinative."

741 F.2d at 934 (citations omitted; numeration added).

*Company, Inc. v. Kraft, Inc.*, 717 F.2d 352, 355 (7th Cir. 1983); see also *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1446 (Fed. Cir. 1984) (Prominent display of seller's name is strong evidence of no likelihood of confusion, particularly where microwave ovens are not impulse items routinely purchased).

Finally, the applicable standard in the Seventh Circuit is not whether a careless consumer would purchase a Euroquilt comforter believing it to have originated from Scandia, but whether an *ordinary* purchaser would be likely to make such a mistake (8a). So viewed, the determination of whether an "ordinary purchaser" would likely be confused by the similarity of two marks is similar to the inquiry in patent law into whether an invention would have been obvious to a "person of ordinary skill". 2 J. McCarthy, *Trademarks and Unfair Competition*, § 23.22, p. 111 (2d ed. 1984). The latter inquiry is generally recognized as a question of law. *E.g.*, *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1534 (Fed. Cir. 1983); see *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

This case illustrates in a straightforward factual context why the characterization of likelihood of confusion as a question of law or fact is not mere semantics. If, as Judge Easterbrook has asserted, "the question of likelihood of confusion is all fact and no law" (6a), evidence (as in this case) that actual confusion has occurred between the marks eviscerates appellate review of the question. For even though the competing marks of Scandia and Euroquilt contain the same descriptive words ("down shop(pe)"), are different in overall appearance,<sup>2</sup> and utilize distinguishing "house marks" ("Scandia" and "Continental Quilt") on expensive products for the discernment of ordinary purchasers, the District Court's

<sup>2</sup> See generally 4 Callmann, *The Law of Unfair Competition, Trademarks and Monopolies*, § 23.5, p. 89 (4th ed. 1983) ("If a common portion of two conflicting marks is a public domain generic word, the emphasis of inquiry should be upon the confusing similarity of the nongeneric portion").

factual finding of actual confusion predetermines tautologically that confusion would be "likely" (and thus that these other relevant factors would be *de facto* inconsequential) if likelihood of confusion is to be determined by application of pure logic.

The Seventh Circuit believed that this Court's decision in *Pullman-Standard v. Swint*, *supra*, required application of the clearly erroneous rule (6a-10a). As Judge Easterbrook correctly pointed out (6a), *Swint* does specify that Rule 52(a) shall apply even to findings of ultimate facts. As Petitioner reads *Swint*, however, this Court did not mandate application of the clearly erroneous rule for conclusions of law or mixed questions of fact and law. See 456 U.S. at 286-88. Accordingly, *Swint* does not foreclose plenary review of a trial court determination on the issue of likelihood of confusion.

## II. The Second Finding of Contempt Violated F.R.Civ.Pro. 65(d)

Petitioner relies on an appropriately named precedent of this Court, *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423 (1974). In *Granny Goose*, the essence of Fed. Rule Civ. Pro. 65(d) was described in the following terms:

As the fine imposed in this case exemplifies, serious penalties can befall those who are found to be in contempt of court injunctions. Accordingly, one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.

*Id.* at 444. Insofar as the second finding of contempt is concerned, Euroquilt did not have fair notice that Logo V was prohibited by the preliminary injunction at the time Logo V was adopted.

In response to the motion for a preliminary injunction, Euroquilt had sought to establish its priority of trademark usage by demonstrating that it had used Logo V—the words "The

Down Shoppe" printed in a typeface called Souvenir Bold—prior to Scandia Down's use of Logo I—the goose plus the words ( ). Since Scandia's logo is a common law trademark, the person using the logo first in a given market has the superior right to that mark. See *Burger King of Florida v. Hoots*, 403 F.2d 904, 907 (7th Cir. 1968); see also *Arthur Retlaw & Associates, Inc. v. Travenol Laboratories, Inc.*, 582 F.Supp. 1010, 1014-15 (N.D. Ill. 1984) ("It is clear that ownership of a trademark is governed by priority of use.")

In reply, Scandia emphasized that Logo V was not what its motion addressed:

[U]se of *THE DOWN SHOPPE* alone [Logo V] since 1974 does not aid defendant since the only trademark to be considered on plaintiff's motion is defendant's *THE DOWN SHOPPE* Goose Logo [Logo II].

\* \* \*

[D]efendant fails to realize that the only trademark being challenged on plaintiff's motion is its *THE DOWN SHOPPE* Goose Logo [Logo II]. Defendant attempts to obscure this limited issue by separating the aforesaid trademark into the various elements of (1) *THE DOWN SHOPPE*, (2) the depiction of a goose and (3) the typeface. This analysis is improper and irrelevant since the overall appearance of the trademark must be considered in the analysis of priority of use and likelihood of confusion.

Defendant's claim that it used a typeface known as Souvenir Bold prior to plaintiff is also a subterfuge. Once again, the issue before this Court is the limited question of whether or not defendant should be enjoined from using *THE DOWN SHOPPE* Goose Logo [Logo II]. Since it is undisputed that plaintiff Scandia had priority of use of its Scandia Down Shops Goose Logo [Logo I], the issue of priority of use of any particular typeface apart from the subject trademark is irrelevant to plaintiff's motion. (emphasis and parentheses added; citations omitted) (50a-52a).



Scandia thus effectively disclaimed its rights to the mark absent a goose, at least for purposes of the preliminary injunction. In essence Scandia in its motion argued that it had a priority of use in Logo I because the presence of the goose distinguished it from Euroquilt's earlier use of *its* mark (Logo V)—the words "The Down Shoppe". Euroquilt had, therefore, a reasonable basis for believing that the use of Logo V did not violate the preliminary injunction. Cf. Callmann, *supra*, at § 22.46: ("An injunction should satisfy the plaintiff's demands, as expressed in the complaint, but it should not exceed the allegations thereof. . .").

What converted that belief into contempt, in the view of the courts below, was a judicial decision subsequent to Euroquilt's adoption of Logo V (15a, 28a-29a). Once the District Court in its May 31, 1984 opinion had adopted the magistrate's recommendation on the first charge of contempt, the District Court considered itself free in that same opinion to find contempt in connection with Logo V in view of Euroquilt's "history as [a] contemnor" (28a).

It is one thing to enjoin a defendant from using a logo that is dissimilar in appearance to a trademark because of *ex post facto* evidence. It is quite another matter, however, to subject the defendant to contempt penalties for using that logo on the basis of such evidence. Yet the latter accurately describes the basis for the second finding of contempt. The requirement of fair notice embodied in Fed. Rule Civ. Pro. 65(d) was not met, therefore, with respect to the second finding of contempt. Cf. *Bouie v. Columbia*, 378 U.S. 347, 352 (1964) ("There can be no doubt that a deprivation of the right of fair warning can result. . . from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language").

Petitioner would once again point to a (very) recent opinion of the Court of Appeals for the Federal Circuit as better exemplifying the resolution of this issue. In *KSM Fastening Systems, Inc. v. H.A. Jones Company, Inc.*, \_\_\_\_F.2d\_\_\_\_, 227

USPQ 676 (October 29, 1985), the Federal Circuit, citing this Court's opinion in *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885), held that contempt of an injunction against future infringement should not lie if there is a "fair ground of doubt" about whether the injunction against infringement has been violated \_\_\_\_F.2d\_\_\_\_, 227 USPQ at 678.

This "fair ground of doubt" standard was clearly not employed by the Seventh Circuit in this case:

The fourth logo [Logo V] does not contain a goose, and Euroquilt insists that it is entitled to use such a logo. *If the fourth logo had been introduced in place of the second [Logo III], Euroquilt might have had a good point. The district court conceded as much.* But the district court properly took into account Euroquilt's "history as an infringer and contemnor" in deciding to restrict its leeway in designing new logos. The court drew a line between logos using Souvenir Bold or any similar typeface, and logos that have a different appearance.

(15a) (emphasis added). The Seventh Circuit's approach is facially inconsistent with the analysis in *KSM*, where the Federal Circuit recognized "the universal rule" emanating from *Granny Goose* that:

[C]ontempt proceedings, civil or criminal, are available only with respect to devices previously admitted or adjudged to infringe, and to other devices which are no more than colorably different therefrom. . .

\_\_\_\_F.2d\_\_\_\_, 227 USPQ at 679. Simply put, the Seventh Circuit ruled that the District Court's May 31, 1984 decision, holding that the use of Logo IV had constituted contempt, freed the District Court from having to determine whether Logo V was a "colorable imitation" of Logo II.

The "fair ground of doubt" stated in *California Artificial Stone Paving* and the "fair notice" requirement of *Granny Goose* are really different ways of stating the same requirement that an enjoined party be able to recognize in advance what

acts are prohibited to him. See *KSM. supra*, 227 USPQ at 678-79. Years ago, Justice Traynor nicely expressed the fundamental nature of the requirement in this manner:

The party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous, just as he may not be held guilty of violating a criminal statute that fails to give him adequate notice of the prohibited acts.

*Brunton v. Superior Court of Los Angeles County*, 20 Cal. 2d 202, 205, 124 P.2d 831, 833 (1942) (citations omitted). The finding of contempt with respect to Logo V is inconsistent with the fundamental requirement of fair and adequate notice.

## CONCLUSION

For the above reasons, it is respectfully submitted that a Writ of Certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Carl E. Moore, Jr.  
MARSHALL, O'TOOLE, GERSTEIN  
MURRAY & BICKNELL  
Two First National Plaza  
Suite 2100  
Chicago, Illinois 60603  
(312) 346-5750

### *Of Counsel*

Douglass C. Hochstetler  
MARSHALL, O'TOOLE, GERSTEIN  
MURRAY & BICKNELL  
Two First National Plaza  
Suite 2100  
Chicago, Illinois 60603  
(312) 346-5750

## **APPENDIX A**

APPENDIX A  
*In the*  
**United States Court of Appeals**  
**For the Seventh Circuit**

---

No. 85-1193

SCANDIA DOWN CORPORATION, a California Corporation,  
and GOOSE DOWN, INC., an Illinois Corporation,  
*Plaintiffs-Appellees,*

*v.*

EUROQUILT, INC., a New Jersey Corporation,  
*Defendant-Appellant.*

---

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.  
No. 82 C 5491—*Susan Getzendanner, District Judge.*

---

ARGUED JUNE 11, 1985—DECIDED SEPTEMBER 13, 1985

---

Before COFFEY and EASTERBROOK, *Circuit Judges*, and  
GRANT, *Senior District Judge*.\*

EASTERBROOK, *Circuit Judge*. Scandia Down Corp.  
franchises a nationwide chain of 56 stores selling bedding  
products, including down-filled comforters. Since 1976 its  
principal trademark has been a logo with its name and an  
outline of a goose.



---

\* The Honorable Robert A. Grant, Senior District Judge of the  
Northern District of Indiana, is sitting by designation.



Scandia has spent more than \$1.5 million in promotions using the trademark. This trademark is not registered, and accordingly questions of infringement concern common rather than statutory law. (Two related marks are registered, one in Illinois and one with the United States, but we need not consider them.)

Euroquilt has three stores on the east coast and for a while had a store in Chicago. It, too, sells bedding products. Until 1982 Euroquilt sold its products under the name Euroquilt and Continental Quilt, although one of its stores used a small sign with the words "The Down Shoppe" to describe a department. In April 1982 Euroquilt adopted a new logo to identify its stores and products.



The logo precipitated this suit, and in November 1982 the district court entered a preliminary injunction against the use of this logo "or any colorable imitation thereof" in connection with Euroquilt's promotion or sale of comforters or bedding products.

In March 1983 Euroquilt started using a new logo, with the same typeface (Souvenir Bold) but a new goose.



Scandia almost immediately objected that this logo violated the preliminary injunction, and Euroquilt promptly substituted a third logo.



This logo brought the parties back to court, with Scandia insisting that "Down Shoppes" in Souvenir Bold, coupled with a goose, was a "colorable imitation" under the injunction. A magistrate agreed, recommending in September 1983 that Euroquilt be held in contempt. The magistrate concluded, after the parties had produced evidence, that the new logo had caused substantial confusion. The magistrate did not comment on the difference between recumbent and airborne geese.

The district court took the magistrate's recommendation under advisement and held a trial in October 1983 on Scandia's request for a permanent injunction. After the trial Euroquilt started using a fourth logo, again in Souvenir Bold but this time sans goose.



Scandia objected yet again, and the district court held a supplementary hearing on Scandia's request to hold Euroquilt in contempt a second time.

The district court disposed of all pending disputes in a single opinion. The court held Scandia entitled to a permanent injunction on the ground that Euroquilt's first logo was similar to Scandia's logo and had caused confusion, that the infringement was wilful, and that Euroquilt designed its logos "in a deliberate effort to capture [Scandia's] customers." The court adopted the magistrate's recommendation that Euroquilt's third logo violated the preliminary injunction because it was a colorable imitation of the first logo. Because this finding of contempt made Euroquilt a repeat offender, the court concluded that Euroquilt also must stop using its fourth logo. The court enjoined Euroquilt's use of "The Down Shoppe" in Souvenir Bold "or substantially similar typeface." It ordered Euroquilt to turn over to Scandia all profits made between the filing of Scandia's first motion to hold Euroquilt in contempt and the time the infringing logos no longer affected Scandia's sales.

# I

Euroquilt was not represented by counsel at trial. Counsel who had represented Euroquilt through the hearing on contempt withdrew before trial, protesting that they had not been paid. The district court gave Euroquilt a month to obtain new counsel but declined to postpone the trial further. Euroquilt did not, and it went to trial "represented" by Monte Dow, its president and sole stockholder. Scandia did not object to this. After trial Euroquilt retained new counsel, who filed a motion for a new trial on the ground that a layman may not represent a corporation. Counsel repeat this argument on appeal.

The basic proposition is correct. A "corporation" is an abstraction, and abstractions cannot appear pro se. The corporation is just a convenient name for a complex web of contracts among managers, workers, and suppliers of equity and debt capital. Dow may have been the sole equity investor in Euroquilt, but he did not represent

other interests such as those of creditors. Cf. *Upjohn Co. v. United States*, 449 U.S. 383, 390-92 (1981) (rejecting the proposition that senior managers and the corporation have identical interests). We have held that corporations must appear by counsel or not at all. *Strong Delivery Ministry Ass'n v. Board of Appeals*, 543 F.2d 32, 33-34 (7th Cir. 1976). See also, e.g., *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385-86 (11th Cir. 1985); 28 U.S.C. §1654. If Scandia had objected to Dow's representation of Euroquilt, the district court would have been required to prevent Euroquilt from appearing at trial.

The upshot of this would have been the entry of a default judgment for Scandia, unless the district court was required to give Euroquilt more time to obtain counsel. But Euroquilt had had counsel before, and its decision to put its lawyers' bills at the bottom of the stack caused the problem of which it now complains. A corporation may not grant itself a continuance by manipulating things so that it has no counsel. The district judge would have been entitled to dismiss the case — which she said she would have done — rather than force Scandia to wait indefinitely for Euroquilt to retain counsel. Cf. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (whether to dismiss a case for plaintiff's procedural failings rests in the discretion of the district court); *Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 189-91 (D.C. Cir. 1985) (Scalia, J., dissenting).

At all events Euroquilt cannot protest its own decision to proceed with Dow in the courtroom. See *Schiffrin v. Chenille Mfg. Co.*, 117 F.2d 92, 94-95 (2d Cir.), cert. denied, 313 U.S. 590 (1941). If Dow's decision injured creditors of Euroquilt, they might have an action against him, but this is not a good reason to put Scandia through a second trial. Given its alternative of a default judgment, Euroquilt may not say that any technical error in permitting Dow to appear in court — if this is an error when the adversary does not object — was harmful within the meaning of Fed. R. Civ. P. 61.



One more preliminary matter. Euroquilt says that we should review the district court's findings about the similarity of the logos and the likelihood of confusion for "error" and should not defer to the district court's findings or apply the clearly erroneous principle of Fed. R. Civ. P. 52(a). Euroquilt offers several reasons, none persuasive.

First Euroquilt draws a distinction between "factual" issues governed by Rule 52(a) and "mixed questions of law and fact," which should be reviewed more freely. Although the existence of confusion in the past is a factual issue, Euroquilt insists that the likelihood of confusion in the future is a mixed issue. It points to *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 935 (7th Cir. 1984), which holds not erroneous a finding of likelihood of confusion while holding not clearly erroneous a finding of actual confusion. If the "clearly erroneous" rule applied to findings of likely confusion, Euroquilt insists, the court would not have spoken of error in *Piper*.

This is altogether too much weight to put on the omission of a word. Opinions are not bond indentures. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341-42 (1979); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62 (1978). Judges become weary of the endless repetition of the same formulas, and they have the liberty to omit a word or two in a sentence without causing avulsive changes in the law. The likelihood of confusion in the future is a question of fact to which this circuit has applied the clearly erroneous rule. See *Piper*, *supra*, 741 F.2d at 939 (Posner, J., concurring); *Henri's Food Products Co. v. Kraft, Inc.*, 717 F.2d 352, 354 (7th Cir. 1983); *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852, 857 (7th Cir. 1982). We need not determine when, if ever, "mixed" questions are reviewed under a different standard; the question of likelihood of confusion is all fact and no law.

Euroquilt also tells us that likelihood of confusion is an "ultimate" issue and therefore should be reviewed more

carefully. The Federal Circuit apparently takes this position. E.g., *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1445 (Fed. Cir. 1984); *Giant Foods, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569 (Fed. Cir. 1983). The proposition that "ultimate" findings should be reviewed with special vigor has drifted in and out of appellate cases for decades. Although we should think carefully before disagreeing with the views of the Federal Circuit, a specialist court on questions concerning intellectual property, we will not change the standard reflected in cases such as *Henri's Food*. The Supreme Court held in *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982), that Rule 52(a) does not permit any distinction between ordinary and "ultimate" findings. The Federal Circuit's cases do not discuss *Swint*, and we conclude that they are inconsistent with that case.

The third argument is that we can examine the logos as readily as the district court, and therefore we should review as an original matter the conclusion that they are confusingly similar. Here, too, Euroquilt invokes a line of argument that has been used with success in many appellate courts for many decades. Here, too, we are under instructions not to follow. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985), explicitly rejects cases holding that appellate courts may substitute their own view of factual findings based on documentary evidence.

The district court's authority to decide factual issues is just that — authority. Rule 52(a) is not a rule of preference that the judge in the best position to listen to an inflection in a witness's voice should determine credibility. The district judge is manager of the entire swirl of facts, and the clearly erroneous rule is based in substantial measure on a belief that because appellate courts never are in a better position than the district court, and often are in a worse one, a substitution of judgment would increase the randomness of the process without increasing accuracy over the run of cases. "Duplication of the trial judge's efforts in the court of appeals would very likely contribute

only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, *supra*, 105 S. Ct. at 1512.

This case illustrates one of the reasons for that approach. We can examine the trademarks as the district court did. But the legal question is not whether the marks look similar to us but whether they look similar to ordinary consumers of bedding products.<sup>1</sup> We have no way to find out how ordinary consumers perceive the marks; the district court, on the other hand, heard testimony on that subject and received evidence of actual confusion. It would be little short of arrogation for an appellate court to claim that just because every judge can bring to bear his own view of what is similar and what is not, the appellate judges' view must be the right one. See *Exxon Corp. v. Exxene Corp.*, 696 F.2d 544, 549-50 (7th Cir. 1982) (similarity between Exxon and Exxene is a question for the jury).

The amendment to Rule 52(a) that became effective August 1, 1985, provides that findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous". The Advisory Committee's note to the amendment states that the new language ("whether based on oral or documentary evidence") is designed to apply the clearly erroneous rule to every form of evidence the district court considers. It explains: "To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some

<sup>1</sup> Learned Hand insisted that the standard was careless rather than ordinary consumers, see *Caron Corp. v. V. Vivaudou, Inc.*, 4 F.2d 995, 997 (2d Cir. 1925); *American Chicle Co. v. Topps Chewing Gum*, 208 F.2d 560, 563 (2d Cir. 1953), but our court has adhered to the "ordinary" purchaser standard of *Coats v. Merrick Thread Co.*, 149 U.S. 562, 572 (1893). See *FS Services, Inc. v. Custom Farm Services, Inc.*, 471 F.2d 671, 675 (7th Cir. 1972); *Life Savers Corp. v. Curtiss Candy Co.*, 182 F.2d 4, 8 (7th Cir. 1950).

factual issues, and needlessly reallocate judicial authority." The Advisory Committee identified *Atari, Inc. v. North American Phillips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982), as among the cases the new rule would alter. To the extent cases such as *Atari* and *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 383 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976), put us in the business of reviewing for mere error findings based on documents or any other kind of evidence, we were put out of it on August 1. The clearly erroneous rule now applies across the board.

Euroquilt's final argument is that we must review the district court's findings with special care because that court adopted findings drafted by Scandia. We have often criticized district courts for doing this, but *Anderson* holds that the resulting findings are nonetheless those of the district court and entitled to the usual deference. 105 S. Ct. at 1510-11. Although we might imagine circumstances even after *Anderson* in which adoption of findings demonstrates such an abdication of the judicial function that we must return the case to obtain the judge's *own* views on the matter, even then we would not substitute our views for those of the district court or alter the standard contained in Rule 52(a).

Here, however, it is evident that the district court paid careful attention to the evidence. The submissions of the parties suggest that Scandia adopted the district court's findings in issuing the preliminary injunction when making proposals, so that the judge's adoption of Scandia's proposals largely reiterated her independent findings from an earlier stage of the litigation. (These, in turn, had been shaped by the magistrate's proposals, not by Scandia's.) The judge also wrote a narrative opinion that is entirely her own creation. The court's findings deserve and receive all the respect Rule 52(a) requires. Under that Rule, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even



though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, supra*, 105 S. Ct. at 1512.

## II

Trademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs. Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market. A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality. The trademark is a valuable asset, part of the "goodwill" of a business. If the seller provides an inconsistent level of quality, or reduces quality below what consumers expect from earlier experience, that reduces the value of the trademark. The value of a trademark is in a sense a "hostage" of consumers; if the seller disappoints the consumers, they respond by devaluing the trademark.<sup>2</sup> The existence of this hostage gives the seller another incentive to afford consumers the quality of goods they prefer and expect.

The more valuable the trademark, the more other firms will be tempted to take a free ride. By adopting similar marks, the imitators induce consumers to select their goods when the customers meant to select the goods of the firm that created the mark. Confusingly similar

<sup>2</sup> The effects may be substantial. Two empirical studies show that firms whose products are recalled or whose advertisements are censured lose sums that substantially exceed the cost of fixing the recalled products or withdrawing the ad campaign. Gregg Jarrell & Sam Peltzman, *The Impact of Product Recalls on the Wealth of Sellers*, 93 J. Political Economy 512 (1985); Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J. Law & Econ. 403 (1981).

marks make consumers' task in searching for products harder. The similar mark also dilutes the hostage value of the first, because the firm that created the mark may lose business on account of the inferior products of its rival, while the rival may not lose as much business as its own quality dictates because customers mistakenly blame the first firm for the failings of the second. As marks become less useful for identification, search, and hostage purposes, firms invest less in them and consumers suffer. This is a familiar pattern in antitrust law, where retailers may try to take a free ride on the services provided by their rivals. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). The concern is no less serious in the law of intellectual property. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218 (1985) (copyright); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (patents); *International News Service v. Associated Press*, 248 U.S. 215 (1918) (general intellectual property); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916) (trademarks). See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411 (1983).

The concern about the free ride does not always help the proprietor of the first mark. He, too, is not permitted to appropriate what he did not create. There are but a limited number of words and images suitable for use in describing a product, and sellers own neither the English language nor common depictions of goods. Descriptive items (such as "down") are therefore not readily appropriable. In the language of trademark law, they are protected only if they have acquired a "secondary" meaning, a meaning associating the words with a particular item or supplier. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n.11 (1982); *Gimix, Inc. v. JS&A Group, Inc.*, 699 F.2d 901, 905-08 (7th Cir. 1983); *Union Carbide Corp. v. Ever-Ready, Inc.*, *supra*, 531 F.2d at 380. If descriptive words and pictures could be appropriated without evidence of a secondary meaning,

sellers could snatch for themselves the riches of the language and make it more difficult for new entrants to identify their own products; consumers would be worse off.

The dispute in this case is largely about whether the words "Down Shop[pe]" in connection with the goose in Scandia's logo are merely descriptive. If they are just "descriptive" Scandia is trying to take a free ride on the language. If they are more — "arbitrary" or "suggestive" in the argot — then Scandia has done its own work and Euroquilt arguably is trying to take the free ride. Euroquilt says Scandia's words and drawing are descriptive. Scandia says that they are "arbitrary" or "suggestive," which means that they are more easily protected.<sup>3</sup>

The words and pictures surely are "descriptive" if taken one at a time. But that is not the right way to take them. The eye sees the combination of words, typeface, and goose as a unit. The perceptual gestalt may make one combination seem very like another — or very different — even though both have the same formal elements. The district court therefore must consider each mark as a unit. *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 505 (5th Cir. 1980); *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 275 (7th Cir. 1976). The district court properly considered the marks as units in this case and was entitled to conclude that none of the marks is merely descriptive.

The court's conclusions that Scandia's mark identifies a product with Scandia, and that Euroquilt's marks are confusingly similar to it, are not clearly erroneous. Both

<sup>3</sup> We have said before that "arbitrary," "suggestive" and the other words in the vocabulary of trademark law may confuse more readily than they illuminate, see *Walt-West Enterprises, Inc. v. Gannett Co.*, 695 F.2d 1050, 1055-57 (7th Cir. 1982), a caution litigants should take seriously before arguing cases so that everything turns on which word we pick. It is better to analyze trademark cases in terms of the functions of trademarks. That frees the arguments from the clutches of Webster's Third and the conflicting advice of text writers.

marks refer to down shops and contain a goose; the marks have similar typefaces. The district court heard much evidence that customers came to Scandia's shops to complain about goods and services they had received (or not received) from Euroquilt; Scandia's employees testified to more than 180 incidents over five months in which people mistook Scandia for Euroquilt in either New York or Chicago. Two of Euroquilt's employees conceded that customers came to Euroquilt's shops seeking goods from Scandia. Euroquilt says that the confusion may have been caused by its omission from the Chicago Yellow Pages for the period in question; perhaps so, but this is not the sort of sally that would permit us to call the district court's finding clearly erroneous. This conclusion does not permit Scandia to appropriate any of the words and images singularly. Euroquilt presses on us the claim that some 13 other sellers of down products use logos containing geese and the word down; that none of these has (so far) caused any confusion with Scandia's mark demonstrates that the mark does not preempt generic words and images.

Worse for Euroquilt, the district court found that Euroquilt intended to infringe Scandia's mark "in a deliberate effort to capture [Scandia's] customers." Euroquilt adopted its new logo only after Scandia rebuffed its offer to merge. The finding on intent, too, is not clearly erroneous, especially given what followed — Euroquilt's effort to evade the injunction. Because we find that there was actual confusion and that consumers identified the original mark with Scandia, we need not decide whether the combination of name, goose, and typeface in any of the marks was "arbitrary" or "fanciful."

### III

This leaves for decision the two findings of contempt, on which the district court based the award of profits. Euroquilt maintains that the preliminary injunction is too



vague to support a finding of contempt. Fed. R. Civ. P. 65(d) requires every injunction to be "specific in terms" and to "describe in reasonable detail . . . the act or acts sought to be restrained". Because violation of an injunction invites serious penalties, Rule 65(d) states an essential requirement of any order. *Schmidt v. Lessard*, 414 U.S. 473 (1974); *American Can Co. v. Mansukhani*, 742 F.2d 314, 332-33 (7th Cir. 1984). But the Rule does not require the impossible. There is a limit to what words can convey. The more specific the order, the more opportunities for evasion ("loopholes"). There are millions of possible logos to which Euroquilt could have turned. Any effort to identify and prohibit one million of them would have left another million or more subject to dispute.

The operative words in the preliminary injunction — "any colorable imitation" of a particular logo — are words of legal art. Euroquilt does not propose a formulation that would have given it better notice. "Colorable imitation" leaves a lot to the imagination, but Rule 65(d) does not require a torrent of words when more words would not produce more enlightenment about what is forbidden. When the difficulty stems from the inability of words to describe the variousness of experience, the court may prefer brief imprecise standards to prolix imprecise standards. The right to seek clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed. Euroquilt did not seek modification or clarification from the district court; it did not ask for assurances that the third or fourth logos are permitted, even though Scandia's objection to the second logo put Euroquilt on notice that Scandia would almost certainly object to the third. Euroquilt has only itself to blame for its current predicament.

Euroquilt's further argument that because of the difference between sitting and flying geese its third logo is not a "colorable imitation" of Scandia's logo fails for two reasons. One, the district court found that it is a colorable imitation and that it had in fact caused substantial

confusion; neither conclusion is clearly erroneous. Two, the preliminary injunction barred Euroquilt from using a colorable imitation of its own first mark, not from imitating Scandia's mark. Euroquilt's third mark is similar, down to the typeface, to its first mark. Euroquilt protests that trademark injunctions should bar imitation of the plaintiff's mark, not of the infringing mark. Perhaps so, but this one did not. What the injunction actually says — not what the parties think it ought to have said — controls subsequent proceedings in contempt. *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 438-40 (1976).

The fourth logo does not contain a goose, and Euroquilt insists that it is entitled to use such a logo. If the fourth logo had been introduced in place of the second, Euroquilt might have had a good point. The district court conceded as much. But the district court properly took into account Euroquilt's "history as an infringer and contemner" in deciding to restrict its leeway in designing new logos. The court drew a line between logos using *Souvenir Bold* or any similar typeface, and logos that have a different appearance. Euroquilt designed a new logo in a typeface similar to *Souvenir Bold* with a heart-shaped figure in place of the "o" in "Down"; the district court stated that this logo would not be condemned in the absence of evidence of actual confusion.

A district court possesses substantial discretion to decide how close is too close, once an infringer has committed a contempt of the original injunction. The court may require the contemnor to choose a distinctively different mark rather than to hew so close to the line that the parties must interminably return to court to haggle about every mark. See *National Van Lines, Inc. v. Dean*, 288 F.2d 5, 10-11 (7th Cir. 1961); *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 215 F.2d 434, 436-37 (7th Cir. 1954). Cf. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-99 (1978) (discussing similar principle in antitrust law).

The district court did not order Euroquilt to drop the words "down" or "shop[pe]"; it simply put one combination of words and typeface off limits. This is a modest restriction on the universe of logos available to Euroquilt, which now must live with the consequences of its prolonged disregard of Scandia's rights.

AFFIRMED

A true Copy:  
Teste:

.....  
*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

**APPENDIX B**  
**District Court, N. D. Illinois**

Scandia Down Corporation et al.  
v.  
Euroquilt, Inc.

No. 82 C 5491  
Decided Nov. 8, 1982

\* \* \*

Action by Scandia Down Corporation, and Goose Down, Inc., against Euroquilt, Inc., for unfair competition, trademark infringement, and dilution. On plaintiffs' motion for preliminary injunction. Motion granted.

Jeremiah D. McAuliffe, Edward G. Wierzbicki, and Pattishall, McAuliffe & Hofstetter, all of Chicago, Ill., for plaintiffs.

Franklin C. Steinberg, and Carella, Byrne, Bain & Gilfillan, both of Newark, N.J., and David A. Crossman, and Fitch, Even, Tabin, Flannery & Welsh, both of Chicago, Ill., for defendant.

Getzendanner, District Judge.

This is an action for unfair competition, trademark infringement and dilution, in which plaintiffs seek to enjoin defendant's use of THE DOWN SHOPPE Goose Logo trademark for comforters, pillows, linens and related bedding products. These are the same type of bedding products sold by plaintiffs. Plaintiffs' Motion for Preliminary Injunction requested this Court to restrain all advertising and promotion of defendant that features THE DOWN SHOPPE Goose Logo trademark. Pursuant to the agreement among the parties, the Motion was referred to Magistrate James T. Balog for hearing. The Motion was fully briefed, and, on October 20, 1982, an evidentiary hearing was conducted by Magistrate Balog in which plaintiffs and defendant presented evidence consisting of

oral testimony, exhibits and affidavits. The Magistrate read all of the briefs, exhibits and affidavits and listened to the testimony. Based upon the observations of the Magistrate at the hearing and his reading of the documents and exhibits, the Court enters the following findings of fact, conclusions of law and injunction.

### Findings of Fact

1. On or about May 23, 1980, plaintiff, Scandia Down Corporation, ("Scandia"), acquired the assets, including the trademarks and service marks together with the goodwill of Scandia Down Licensing, Inc. which was engaged in the business of selling in interstate commerce bedding and related linen products under the SCANDIA DOWN SHOPS Goose Logo trademark.

2. Since 1974, plaintiff, Scandia, and its predecessors have used the following SCANDIA DOWN SHOPS Goose Logo trademark throughout the United States in the advertising and sale of its comforters, pillows, linens and related bedding products:



It is not known exactly when the "TM" symbol was added.

3. Scandia is the owner of an Illinois Certificate of Trademark Registration No. 51,551 for its SCANDIA DOWN SHOPS Goose Logo trademark.

4. Scandia is the owner of the registration in the United States Patent and Trademark Office Reg. No. 1,016,939 for its SCANDIA DOWN trademark.

5. Scandia has undertaken a nationwide advertising program to promote its products under its SCANDIA DOWN SHOPS Goose Logo trademark.

6. Scandia markets its products throughout the United States primarily through 52 franchisees including plaintiff Goose Down, Inc. ("GDI") in the State of Illinois.

7. GDI, as a franchise of Scandia, has conducted substantial advertising in the Chicago area and employs a public relations firm to promote the business of the plaintiffs.

8. Since 1976, Scandia, and its predecessor, have expended in excess of \$600,000.00 in advertising and promotion of their products under its SCANDIA DOWN SHOPS Goose Logo trademark.

9. Since 1976, Scandia, and its predecessor, have sold in excess of \$14,000,000.00 of their products all under its SCANDIA DOWN SHOPS Goose Logo trademark.

10. Since 1981, GDI has sold in excess of \$350,000.00 of its products all under the SCANDIA DOWN SHOPS Goose Logo.

11. As a result of the extensive advertising, marketing and sales of Scandia and its franchisees, Scandia has developed an exceedingly valuable reputation and goodwill in connection with quality bedding and related linen products as symbolized by its name and SCANDIA DOWN SHOPS Goose Logo trademark.

12. Scandia's SCANDIA DOWN SHOP stores are in direct competition with defendant's THE DOWN SHOPPE stores in the retail sale of bedding and related linen products.

13. Prior to March 1982, defendant marketed its products only under the names Euroquilt and Continental Quilt. However, defendant did sometimes use pictures of geese on its store windows and at various times used signs stating "The Down Shoppe" and "The Down With Love Shoppe."



14. Prior to March, 1982, defendant had knowledge of plaintiffs' business and use of the SCANDIA DOWN SHOPS Goose Logo trademark and defendant's president had personally visited Scandia's stores including the store operated by GDI.

15. In March 1982, defendant first commenced advertising, promoting and selling its products under the following THE DOWN SHOPPE Goose Logo trademark:



16. On July 7, 1982 Scandia made a written demand upon defendant that it cease and desist all use of the Goose Logo in connection with the marketing of defendant's products.

17. Defendant made no response to the July 7, 1982 cease and desist demand and has persisted in its use of the Goose Logo in company with THE DOWN SHOPPE as depicted in Paragraph 15 above.

18. In July 1982, defendant moved the location of its Chicago store from 10 East Oak Street to 500 North Wells Street, less than two blocks from GDI's Scandia store on Wells Street.

19. Defendant's Chicago store has advertised its products in Chicago newspapers and other publications distributed in Chicago under THE DOWN SHOPPE Goose Logo trademark.

20. Since the inception of defendant's use of THE DOWN SHOPPE Goose Logo Trademark, Scandia's New York store and GDI have experienced numerous instances of actual confusion.

21. Customers have telephoned Scandia's stores inquiring about unfilled orders placed with defendant's stores.

22. Customers have attempted to return merchandise purchased from defendant's stores to Scandia's stores.

23. Customers have entered Scandia's stores and mentioned they first visited defendant's store believing it to be one of Scandia's stores.

24. Customers have seen defendant's advertisements and believed them to be plaintiffs' advertisements because of defendant's use of THE DOWN SHOPPE Goose Logo trademark.

25. Although some manufacturers and sellers of goose down filled products utilize pictures of one or more geese, photographed, drawn, or stylized, in advertising and selling their products, none of these geese are confusingly similar to the goose used by plaintiffs.

26. The testimony of James Thurston, and the affidavits of Lynn MacShane and Roberta Cooper are evidence of three instances of actual confusion caused by defendant's use of THE DOWN SHOPPE Goose Logo and the testimony of Beverly Rosenberg and the affidavit of Cynthia Malone are further evidence of instances of actual confusion.

#### Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter.

2. The appropriateness of granting a preliminary injunction involves a consideration and balancing of several factors, including the likelihood that plaintiffs will succeed at trial on the merits, the lack of an adequate remedy at law and the prospect of irreparable harm, the relative hardships imposed on the parties, and the public interest. *Banks v. Trainor*, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976). Plaintiffs have established their right to a preliminary injunction in that defendant is infringing plaintiffs' trademark rights in its SCANDIA DOWN SHOPS Goose Logo.



[1] 3. Plaintiffs' SCANDIA DOWN SHOPS Goose Logo is a suggestive trademark entitled to protection without proof of secondary meaning. Moreover, plaintiffs' SCANDIA DOWN SHOPS Goose Logo has acquired secondary meaning by virtue of its extensive advertising and sales and consumer perception. *Union Carbide Corp. v. Ever-Ready, Inc.* 531 F.2d 366, 188 USPQ 623 (7th Cir.), cert. denied, 429 U.S. 830, 199 USPQ 416 (1976).

4. Defendant uses THE DOWN SHOPPE Goose Logo for the identical goods marketed through identical channels of trade.

[2] 5. Irreparable harm is presumed because plaintiffs are unable to control their reputation by reason of defendant's use of a colorable imitation of plaintiffs' trademark. As stated in *Processed Plastic Co. v. Warner Communications, Inc.*, \_\_\_ F.2d \_\_\_, 216 USPQ 1072, No. 81-2157, slip op. (7th Cir. April 7, 1982):

This and many other Courts have often recognized that the damages occasioned by trademark infringement are by their very nature irreparable and not susceptible of adequate measurement for remedy at law \*\*\*\* [T]his readiness to find irreparable injury arises in part from the realization that, "The most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendant's goods. Even if the infringers' products are of high quality, the plaintiff can properly insist that its reputation should not be imperiled by the acts of another.

It is irrelevant whether defendant's product is inferior to plaintiffs' product. The important factor is that plaintiffs' reputation is in the hands of defendant and defendant should not be able to control the public's attitude toward plaintiffs. *James Burrough Ltd. v. Sign of the Beefeater*, 541 F.2d 266 (1976), later app. 572 F.2d 574, 197 USPQ 277 (7th Cir. 1978).

6. Money damages are clearly inadequate.

7. The balance of hardship tips in favor of plaintiffs since plaintiffs merely ask for the limited relief of cessation of media advertising which has caused actual confusion of the public. Defendant may continue to advertise its products under its Euroquilt and Continental Quilt names as it has done in the past. If the confusion continues, plaintiffs' reputation will be taken out of its control especially during the peak selling seasons of fall and winter.

8. Defendant initially chose to use THE DOWN SHOPPE Goose Logo trademark with knowledge of plaintiffs' use of the SCANDIA DOWN SHOPS Goose Logo trademark. Defendant has also persisted in its use of THE DOWN SHOPPE Goose Logo trademark after receiving a cease and desist notice from plaintiffs. Defendant cannot now complain that it will suffer harm if prohibited from using an infringing trademark. As held in *Helene Curtis Industries v. Church & Dwight Co.*, 560 F.2d 1325, 1333, 195 USPQ 218, 223 (7th Cir. 1977), any argument by defendant that it will suffer economic injury if the injunction were entered carries no weight:

These arguments merit little equitable consideration in light of Curtis' willful use of an infringing trademark. As the court in *Colgate-Palmolive Co. v. North American Chemical Corp.*, 238 F.Supp. 81, 87, 144 USPQ 266, 271 (S.D.N.Y. 1964), stated:

[T]he courts will not shy away from issuing such [preliminary injunctive] relief where to do so would be to aid a second comer who has sought to trade upon the efforts and good will of the first comer. As the Court of Appeals for this Circuit expressed the point thirty years ago: "Advantages built upon a deliberately plagiarized make-up do not seem to us to give the borrower any standing to complain that his

vested interests will be disturbed." My-T Fine Corp. v. Samuels, 69 F.2d 76, 78, 21 USPQ 94, 96 (2d Cir. 1934).

The Colgate-Palmolive court continued:

\* \* \* The difficulty is enhanced by the fact that defendant continued and indeed expanded its conduct after notice from plaintiff at a time when defendant could reasonably have minimized its efforts and expenses and when no good will of major value had attached to its activities.

[3] 9. The public interest favors the entry of the preliminary injunction since actual confusion of the public has been caused by defendant's use of THE DOWN SHOPPE Goose Logo trademark. As stated in St. Charles Mfg. Co. v. St. Charles Furniture Corp., 482 F.Supp. 397, 403, 206 USPQ 342, 347 (N.D.Ill. 1979):

In actions for infringement of rights in trade names and trademarks, Courts have a duty to protect the private rights of the original owner and the right of the public to be free from confusion, deception and mistake. Mishawaka Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205, 62 S.Ct. 1022, 86 L.Ed. 1381, 53 USPQ 323 (1942).

*It Is Therefore Ordered That:*

1. Defendant, its agents, servants, employees, and any and all other persons under defendant's control and/or direction be restrained from advertising and promoting the sale of comforters, pillows, linens and related bedding products under THE DOWN SHOPPE Goose Logo trademark (as defined in paragraph 15 of the court's findings of fact) or any colorable imitation thereof.

**APPENDIX C**  
IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

SCANDIA DOWN CORPORATION, et al.,	}	No. 82 C 5491
<i>Plaintiffs,</i>		
v.		
EUROQUILT, INC.,		
	<i>Defendant.</i>	

**MEMORANDUM OPINION AND ORDER**

SUSAN GETZENDANNER, District Judge:

This case is before the court on several matters. First, the court has before it Magistrate Balog's proposed findings of fact and recommendations to the court on plaintiffs' motion to hold the defendant in civil contempt dated September 2, 1983, and defendant's objections to the Magistrate's report and recommendations. Second, the court has before it the claims of the plaintiff and the claims of the counter-plaintiff for decision following trial. The plaintiffs have submitted proposed findings of fact and conclusions of law with respect to the plaintiffs' claims. Finally, the court has before it the plaintiffs' motion for civil contempt dated February 17, 1984, which is fully briefed.

This case involves two well-known competitors involved in the sale of down bedding products. Since 1976, the plaintiffs have used the "Scandia Down Shops Goose Logo" trademark which includes the use of a goose and Souvenir Bold typeface. Prior to 1982, the defendant used the trade names Euroquilt and Continental Quilt and in its advertisements used the slogan "Down With Love" in Souvenir Bold. In April of 1982, the defendant began to use "The Down Shoppe Goose Logo," sometimes including the phrase "A division of Continental

Quilt." The use of these logos, and any colorable imitations, was preliminarily enjoined by the court on November 8, 1982.

In about March of 1983, the defendant began to use "The Original Down Shoppes Goose Logo" (with "of Continental Quilt" in very fine print). Upon plaintiffs' demand, the use of this logo ceased. The defendant subsequently began to use "The Down Shoppes of Continental Quilt Goose Logo" in a slightly different typeface, and plaintiffs sought an injunction against this use. The matter was heard by the Magistrate and on September 2, 1983, he issued a report finding that that logo violated the terms of the preliminary injunction and that the defendant was in willful civil contempt of the court's preliminary injunction.

The court has considered the defendant's objections to the Magistrate's report and recommendations and agrees only in part with the objection to paragraph 11 of the Magistrate's proposed conclusions of law. In paragraph 11 the Magistrate states that the plaintiffs are entitled to a recovery of defendant's profits made since its first use of "The Down Shoppe Goose Logo" as a form of compensatory relief for the injury sustained by the plaintiffs from defendant's invasion of plaintiffs' right to have compliance with the preliminary injunction order. The court believes that the accounting for profits should be limited to the period from the filing of the plaintiffs' motion to hold the defendant in civil contempt to the time the use of the logo, or any subsequent logo found to infringe the plaintiffs' marks, ceases affecting defendant's sales.

The trial of the case was conducted on October 28, 1983. The defendant's attorney had withdrawn and defendant was unable to obtain another lawyer. The court refused a further continuance and the defendant proceeded pro se by its president, Mr. Monte Dow. No objection was made to the defendant corporation proceeding pro se.

At the trial the court heard the plaintiffs' evidence and allowed the defendant to present its evidence. In addition to the testimony of Monte Dow, the defendant presented two affidavits of potential trial witnesses.<sup>1</sup> Mr. Dow testified that prior to 1976 the defendant sometimes used a sign "The Down Shoppe" in the window and inside the store in one or more of defendant's stores in the East, and that the defendant would sometimes put a fake goose in the shop window. In addition, Mr. Dow testified that the confusion of customers relied upon by the plaintiff was probably attributed to the fact that defendant's telephone number had mysteriously been omitted from various telephone directories.

Notwithstanding this evidence, the court accepts the proposed findings of fact and conclusions of law proposed by the plaintiffs. The court is persuaded that the defendant willfully infringed the plaintiffs' "Scandia Down Shop Goose Logo" trademark in a deliberate effort to capture the plaintiffs' customers. The slight evidence concerning the use of a sign and a fake goose in the window of one or more stores in the East does not establish defendant's prior rights in "The Down Shoppe Goose Logo." There was no prior combination of the goose and the words "The Down Shoppe" and no proof that the Souvenir Bold typeface was used in connection with the use of the words "Down Shoppe." Finally, plaintiffs' proof of actual customer confusion remains largely unrebutted.

The defendant did not present any evidence with respect to Count I of the counterclaim which deals with the plaintiffs' alleged use of the mark "Continental." The parties later informed the court that Count I was moot. Count II of the counterclaim is for unfair competition based on the plaintiffs' use of "Scandia Down Shops." Defendant claims prior rights to

<sup>1</sup> These affidavits are not admissible in evidence for purposes of the trial.



this mark based on its alleged prior use of "The Down Shoppe" in Souvenir Bold. Defendant presented no evidence regarding the typeface used on its occasional signs using "The Down Shoppe." In any event, the court finds that the plaintiffs' mark "Scandia Down Shops" does not constitute unfair competition.

Finally, the court has considered the plaintiffs' motion with respect to the defendant's new logo. In connection with this motion the defendant again was represented by counsel. The court has been informed by the parties that shortly after running the advertisements which used "The Down Shoppe Logo" in Souvenir Bold without the goose, the defendant closed its Chicago shop. The defendant still operates its New York shops and has resorted to using "The Down Shoppe" as its only trade name or trademark to identify its business.

The issue presented by this motion is whether defendant's use of "The Down Shoppe" in conjunction with a stylized typeface as a trademark is a colorable imitation of defendant's "The Down Shoppe Goose Logo." Determination of this issue must be made in the context of defendant's history as an infringer and contemner. In assessing the conduct of an infringer, the court may look to whether "principles of old-fashioned honesty were followed." *Independent Nail and Packing Co. v. Stronghold Screw Products*, 205 F.2d 921, 924 (7th Cir. 1953); *National Van Lines, Inc. v. Dean*, 288 F.2d 5, 10 (7th Cir. 1961). Thus, this court need not determine whether an innocent third party may use arguably descriptive words "down" and "shop(pe)" in combination with each other.

An infringer must keep a safe distance from the margin line even if the infringer cannot use a descriptive, or even a generic term, available for use by other, innocent parties. As stated in *World's Finest Chocolate, Inc. v. World Candies, Inc.*, 409 F.Supp. 840, 844 (N.D. Ill. 1976) *aff'd* 559 F.2d 1226 (7th Cir. 1977),

It is well established that the protection of a trademark requires that a party once convicted of infringement or unfair competition should keep a safe distance from the margin line between compliance with the order and a violation. *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 215 F.2d 434, 436 (7th Cir. 1954); *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353, 354 (6th Cir. 1930). Having once determined that the plaintiff was entitled to relief, the relief granted should be effective within the terms of the judgment. A party who takes it upon himself to avoid the terms of a court order does so at his peril.

Given the defendant's conduct in copying the plaintiffs' marks over a period of time, the court finds that the defendant's latest effort to copy the plaintiffs violates the preliminary injunction entered in this case.

Accordingly, the use of "The Down Shoppe" in Souvenir Bold or substantially similar typeface is enjoined.

At a chambers conference with the parties the defendant's attorney showed the court a proposed new advertisement which used the words "The Down Shoppe" without a goose in a typeface similar to, but not identical to, Souvenir Bold. However, instead of using an "o" in "Down," a large heart-shaped figure was used. This appears to distinguish the defendant's logo from the plaintiffs' marks, although evidence of actual confusion would be pertinent to the resolution of the issue should the issue formally be presented to the court.

In summary, the court (1) adopts the report and recommendations of the Magistrate dated September, 1983 except with respect to paragraph 11 of the proposed conclusions of law, which paragraph is modified in accordance with this opinion; (2) grants the plaintiffs' motion for civil contempt dated February 22, 1984; and (3) adopts the plaintiffs' proposed findings of fact and conclusions of law and enters judgment for the plaintiffs and against the defendant on the complaint and counterclaim.

Defendant, its agents, servants, employees and attorneys, and those persons in active concert or participation with defendant are enjoined and restrained permanently from using in advertising, promotion or sale of bedding and related linen products "The Down Shoppe," "Original Down Shoppes Goose Logo" and "Down Shoppes Goose Logo," or any colorable imitations thereof which are likely to be mistaken or confused with Scandia's "Down Shops" name and "Scandia Down Shops Goose Logo" trademark.

Defendants are required to pay to plaintiffs the costs of this action, together with plaintiffs' reasonable attorneys' fees and disbursements incurred herein as provided in 15 U.S.C. 1117 and Ill.Rev.Stat. ch. 121 ½ § 270(a) and § 313.

It is so ordered.

SUSAN GETZENDANNER

Susan Getzendanner  
United States District Judge

May 31, 1984

IN THE UNITED STATES DISTRICT COURT  
For The Northern District of Illinois  
Eastern Division

SCANDIA DOWN CORPORATION, and  
Goose Down, Inc.,  
*Plaintiffs,*

v.

EUROQUILT, INC.,  
*Defendant.*

No. 82 C 5491

TO: HONORABLE SUSAN GETZENDANNER, JUDGE  
UNITED STATES DISTRICT COURT

HONORABLE JUDGE:

On August 31, 1983, I held a hearing on the Plaintiff's motion to hold the Defendant in civil contempt for violating the court's Preliminary Injunction Order of November 8, 1982. I hereby submit the following:

**PROPOSED FINDINGS OF FACT**

1. The findings of fact set forth in the Order of Preliminary Injunction entered in this action on November 8, 1982, are incorporated as findings of fact for this motion.

2. On October 20, 1982, a hearing was conducted before Magistrate Balog on Plaintiffs' Motion for a Preliminary Injunction which sought to enjoin Defendant from engaging in any media advertising infringing Plaintiffs' SCANDIA DOWN SHOPS Goose Logo trademark.

3. After hearing a full day of evidence, including testimony and affidavits, Magistrate Balog found that Plaintiffs' SCANDIA DOWN SHOPS Goose Logo trademark had developed an exceedingly valuable reputation and goodwill which was being infringed by Defendant's use of its THE DOWN SHOPPE Goose Logo trademark.

4. On November 8, 1982, an Order of Preliminary Injunction was entered which restrained Defendant "... from advertising and promoting the sale of comforters, pillows, linens, and related bedding products under THE DOWN SHOPPE Goose Logo trademark (as defined in Paragraph 15 of the Court's finding of fact) or any colorable imitation thereof."

5. Defendant's THE DOWN SHOPPE Goose Logo trademark enjoined by the court appears as follows:



6. On March 20, 1983, Plaintiffs became aware of Defendant's use of a second Logo in its advertising for the sales of its products, as follows:



7. On March 28, 1983, Plaintiffs advised Defendant its second Logo was a violation of the November 8, 1982, Order of Preliminary Injunction and demanded Defendant immediately cease all use of it.

8. The Defendant has ceased all use of the second Logo without any admission.

9. The Defendant commenced use of a third Logo in its advertising for the sale of its products, as follows:



10. On April 8, 1983, Plaintiffs demanded Defendant cease use of this third Logo as a violation of the Preliminary Injunction Order and Defendant refused.

11. Defendant adopted the first Logo, THE DOWN SHOPPE Goose Logo, with prior knowledge of Plaintiffs' business and of its Logo to identify that business.

12. At the Preliminary Injunction hearing referred to in Paragraph 3, Defendant was made aware of instances of actual confusion caused by Defendant's use of its first Logo.

13. Notwithstanding the preliminary injunction against the use of the first Logo as well as any "*colorable imitation*", Defendant, with knowledge of the confusion caused by its first Logo, adopted the two subsequent Logos identified above, each of which retained the distinctive features of its first Logo.

14. Defendant's course of conduct prior to and following the Preliminary Injunction hearing reveals a calculated and deliberate intent to trade upon Plaintiffs' valuable reputation and goodwill by staying as close as possible to Plaintiffs' SCANDIA DOWN SHOPS Goose Logo trademark.



15. Defendant's present use of its DOWN SHOPPES Goose Logo, which perpetuates the distinctive features of the enjoined THE DOWN SHOPPE Goose Logo, has caused and continues to cause confusion with Plaintiffs.

16. Because of Defendant's use, since about April 8, 1983, of its DOWN SHOPPES Goose Logo identified above:

(a) Customers have mistakenly telephoned Plaintiffs' stores inquiring about unfilled orders placed with Defendant's stores.

(b) Customers have mistakenly complained to Plaintiffs' stores about merchandise purchased from Defendant's stores.

(c) Customers have mistakenly entered Plaintiffs' stores believing Plaintiffs' stores to be affiliated with Defendant's stores.

(d) Customers have mistakenly entered Plaintiffs' stores inquiring about sales advertised by Defendant.

(e) Customers have seen Defendant's advertisements and mistakenly believed them to be Plaintiffs' advertisements.

#### Proposed Conclusions of Law

1. The conclusions of law set forth in the Order of Preliminary Injunction entered in this action on November 8, 1982, are incorporated as conclusions of law for this motion.

2. The court has jurisdiction over the parties and the subject matter.

3. The power to punish for civil contempt is an inherent power of the federal courts. *In re: Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952).

4. Effective relief pursuant to an injunction order requires the infringer to choose a distinctly different mark and not try to stay as close as possible to the infringed mark. *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 215 F.2d 434, 436 (7th Cir. 1954).

5. An infringer cannot do acts, such as using a descriptive or generic term, which could otherwise be done by an innocent party. *World's Finest Chocolate, Inc. v. World Candies, Inc.*, 409 F.Supp. 840, 844 (N.D.Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977); *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353, 354 (6th Cir. 1930); *AMF Incorporated v. International Fiberglass Co., Inc.*, 409 F.Supp. 1063, 1065 (1st Cir. 1972).

6. An injunction barring the use of Plaintiffs' trademark is also a bar to the use of any trademark in close imitation or resemblance to the trademark. *World's Finest Chocolate, Inc. v. World Candies, Inc.*, 409 F.Supp. 840, 844 (N.D.Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977); *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353, 354 (6th Cir. 1930).

7. An order of contempt is appropriate when Defendant adopts a trademark so like the enjoined trademark in form, spelling, or sound, that a person who does not have a clear recollection of the real trademark is likely to become confused or misled. *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 215 F.2d 434, 436 (7th Cir. 1954); *Northern Warren Corporation v. Universal Cosmetic Co.*, 18 F.2d 774 (7th Cir. 1927).

8. Defendant's DOWN SHOPPES Goose Logo is a colorable imitation of Plaintiffs' SCANDIA DOWN SHOPS Goose Logo because it retains distinctive features of the enjoined Logo and gives the general impression that Defendant's Logo is Plaintiffs' Logo. *Screw Machine Tool Company v. Slater Tool and Engineering Corporation*, 480 F.2d 1042 (6th Cir. 1973).

9. The purpose of sanctions in civil contempt proceedings is to assure Defendant's future compliance with the injunction and to compensate Plaintiffs for Defendant's contumacious conduct. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 748 (7th Cir. 1976).

10. Plaintiffs are entitled to recover all expenses, including attorneys fees, incurred in enforcing the Order of Preliminary Injunction of November 8, 1982. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932); *World's Finest Chocolate, Inc., v. World Candies, Inc.*, 409 F.Supp. 840, 846 (N.D.Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977); *W. E. Bassett Company v. Revlon, Inc.*, 435 F.2d 656, 665 (2d Cir. 1970).

11. Plaintiffs are entitled to a recovery of Defendant's profits made since its first use of its DOWN SHOPPE Goose Logo as a form of compensatory relief for the injury sustained by the Plaintiffs from Defendant's invasion of Plaintiffs' right to have compliance with the Order of Preliminary Injunction of November 8, 1982. *World's Finest Chocolate, Inc., v. World Candies, Inc.*, 409 F.Supp. 840, 846 (N.D.Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977); *W. E. Bassett Company v. Revlon, Inc.*, 435 F.2d 656, 665 (2d Cir. 1970).

IT IS RECOMMENDED that an order be entered

(a) requiring Defendant to cease all use of DOWN SHOPPES Goose Logo as identified in Finding No. 9 any colorable imitation thereof;

(b) requiring Defendant to pay to Plaintiffs an amount sufficient to compensate Plaintiffs for their damage and Plaintiffs' reasonable attorneys' fees, expenses and costs incurred as a result of Defendant's violation of the Order of this Court;

(c) requiring an accounting of Defendant's for profits made from sales of products under its DOWN SHOPPES Goose Logo.

Respectfully submitted,

JAMES T. BALOG

James T. Balog  
United States Magistrate

DATE: Sept. 2, 1983

The parties may serve and file written objections to these Proposed Findings of Fact and Proposed Conclusions of Law within ten (10) days.

Copies have, this date, been mailed to:

EDWARD WIERZBICKI  
Pattishall, McAuliffe & Hofstetter  
33 West Monroe Street - 28th Floor  
Chicago, Illinois 60603  
Attorney for Plaintiffs

DAVID A. CROSSMAN  
Fitch, Even, Tabin, Flannery & Welsh  
135 South LaSalle Street - Room 900  
Chicago, Illinois 60603  
Attorney for Defendant



IN THE UNITED STATES DISTRICT COURT  
For the Northern District of Illinois  
Eastern Division

SCANDIA DOWN CORPORATION, a California corporation, and Goose Down, Inc., an Illinois corporation,

*Plaintiffs,*

v.

EUROQUILT, INC.,  
a New Jersey corporation,

*Defendant.*

Civil Action  
No. 82 C 5491

Honorable  
Susan Getzendanner

**PLAINTIFFS' PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF LAW**

**FINDINGS OF FACT**

1. Plaintiff, Scandia Down Corporation (hereinafter "Scandia"), is a California corporation having its principal place of business at 1040 Industry Drive, Seattle, Washington 98188.

2. Plaintiff, Goose Down, Inc. (hereinafter "GDI"), is an Illinois corporation doing business as a franchisee of plaintiff, Scandia, at 607 North Wells Street, Chicago, Illinois.

3. Defendant, Euroquilt, Inc., is a New Jersey corporation doing business at 500 North Wells Street, Chicago, Illinois.

4. Monte Dow has controlled and is responsible for all of Euroquilt's and Continental's activities including the selection and use of Euroquilt's trademarks, logos and tradenames.

5. Monte Dow is the president of defendant Euroquilt, and has held that position since Euroquilt's incorporation.

6. Scandia and its franchisees, including GDI, are engaged in the business of selling in interstate commerce, and in Illinois,

bedding and related linen products such as pillows and comforters manufactured and marked according to Scandia's precise standards and specifications.

7. Since at least as early as 1976, Scandia and its predecessors have used the names and trademarks SCANDIA DOWN and SCANDIA DOWN SHOPS for and related linen products throughout much of the United States, including Illinois.

8. On or about May 23, 1982, Scandia acquired the assets, including the trademarks and service marks together with the goodwill appurtenant thereto of two related Washington corporations which were engaged in the business of selling in interstate commerce bedding and related linen products under the SCANDIA DOWN SHOPS Goose Logo trademark.

9. Scandia is the owner of a registration in the United States Patent and Trademark Office, Reg. No. 1,016,939 for its SCANDIA DOWN trademark for down comforters.

10. Since at least 1976, Scandia, and its predecessors have used the following SCANDIA DOWN SHOPS Goose Logo trademark in the advertising and sale of its comforters, pillows, linens and related bedding products:



11. Scandia is the owner of a registration in the United States Patent and Trademark Office, Reg. No. 1,250,410 for its Goose Design for bedding and related linen products.

12. Scandia has undertaken a nationwide advertising program to promote its products under its SCANDIA DOWN SHOPS Goose Logo trademark.

13. Scandia markets its products throughout the United States primarily through 56 franchisees including plaintiff Goose Down, Inc. ("GDI").

14. GDI, as a franchisee of Scandia, has conducted advertising in the Chicago area and employs a public relations firm to promote the reputation and maintain its goodwill of the plaintiffs.

15. Since 1976, Scandia and its franchisees have expended in excess of \$1,500,000.00 in advertising and promotion of its products under its SCANDIA DOWN SHOPS Goose Logo trademark.

16. Since 1976, Scandia has sold in excess of \$14,000,000.00 of its products all under its SCANDIA DOWN SHOPS Goose Logo trademark.

17. As a result of the extensive advertising, marketing and sales of Scandia and its franchisees, Scandia has developed an exceedingly valuable reputation and goodwill in connection with quality bedding and related linen products as symbolized by its name and SCANDIA DOWN SHOPS Goose Logo trademark.

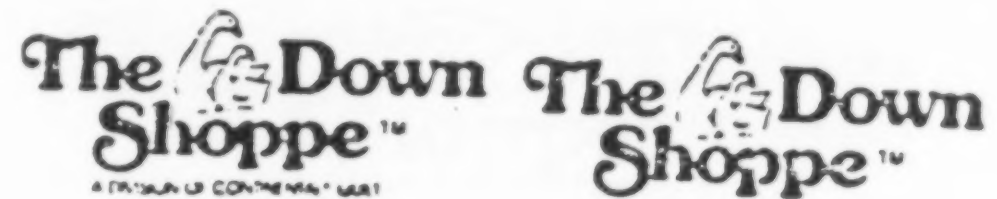
18. Plaintiffs' SCANDIA DOWN SHOPS stores are in direct competition with Euroquilt's THE DOWN SHOPPE stores in the retail sales of bedding and related linen products to the same classes of customers.

19. Prior to April 1982, defendant marketed products only under the names Euroquilt and Continental Quilt.

20. Prior to March, 1982, defendant had knowledge of plaintiffs' business and use of the SCANDIA DOWN SHOPS Goose Logo trademark and Monte Dow had personally visited Scandia's stores including the stores operated by GDI.

21. In April, 1982, defendant first commenced advertising, promotion and selling its products under the following THE DOWN SHOPPE Goose Logo trademarks:

*Logo With Continental Quilt    Logo Without Continental Quilt*



22. Defendant adopted the Logos identified in Paragraph 23, with prior knowledge of plaintiffs' business and of plaintiff's use of its SCANDIA DOWN SHOPS Goose Logo to identify that business.

23. On July 7, 1982, Scandia made a written demand upon defendant that defendant cease and desist all use of THE DOWN SHOPPE Goose Logo trademark in connection with the marketing of Euroquilt's products.

24. Defendant made no response to the July 7, 1982 cease and desist demand and persisted in the use of THE DOWN SHOPPE Goose Logo trademark.

25. In July, 1982, defendant moved the location of its Chicago store from 10 East Oak Street to 500 North Wells Street, less than two blocks from GDI's store on Wells Street.

26. Defendant's Chicago store advertised its products in Chicago newspapers and other publications distributed in Chicago under THE DOWN SHOPPE Goose Logo trademark.

27. Since the inception of defendant's use of THE DOWN SHOPPE Goose Logo trademark, Scandia's New York store and GDI have experienced numerous instances of actual confusion including:

(a) Customers have telephoned Scandia's stores inquiring about unfilled orders placed with defendant's stores.

(b) Customers have attempted to return merchandise purchased from defendant's stores to Scandia's stores.

(c) Customers have entered Scandia's stores and mentioned they first visited defendant's store believing it to be one of Scandia's stores.

(d) Customers have seen defendant's advertisements and believed them to be plaintiffs' advertisements because of defendant's use of THE DOWN SHOPPE Goose Logo trademark.

28. Although some manufacturers and sellers of goose down filled products utilize pictures of one or more geese, photographed, drawn, or stylized, in advertising and selling their products, none of these geese are confusingly similar to the federally registered goose design trademark used by plaintiffs.

29. On October 20, 1982, a hearing was conducted before Magistrate Balog on Plaintiffs' Motion for a Preliminary Injunction which sought to enjoin defendant from engaging in any media advertising infringing plaintiffs' SCANDIA DOWN SHOPS Goose Logo trademark.

30. At the October 20, 1982, Preliminary Injunction hearing, defendant was made aware of instances of actual confusion caused by defendant's use of THE DOWN SHOPPE Goose Logo.

31. On November 8, 1982, an Order of Preliminary Injunction was entered which restrained defendant "... from advertising and promoting the sale of comforters, pillows, linens, and related bedding products under THE DOWN SHOPPE Goose Logo trademark (as defined in Paragraph 15 of the Court's findings of fact) or any colorable imitation thereof."

32. On March 20, 1983, plaintiffs became aware of defendant's use of a second logo in its advertising for the sale of its products, as follows:



33. On March 28, 1983, Scandia advised defendant the second logo was a violation of the November 8, 1982, Order of Preliminary Injunction, and demanded defendant immediately cease all use of it.

34. Subsequent to Scandia's cease and desist demand, defendant ceased all use of the second logo.

35. After it ceased use of the second logo, defendant commenced use of a third logo in its advertising for the sale of its products, as follows:



36. On April 8, 1983, Scandia demanded defendant cease use of the DOWN SHOPPES Goose Logo as a violation of the November 8, 1982 Order of Preliminary Injunction and defendants refused.

37. On August 31, 1983 Magistrate Balog found defendant's use of its DOWN SHOPPES Goose Logo violated the November 8, 1982 Order of Preliminary Injunction and found defendant to be in willful civil contempt of this Court.



38. Notwithstanding the preliminary injunction against the use of the first logo, as well as any "*colorable imitation*", defendant, with knowledge of the confusion caused by its first logo, adopted the two subsequent logos identified above, each of which retained the distinctive features of its first logo.

39. Defendant's second and third logos both used a goose design which had been used by Scandia in 1977 and which had been presented in exhibits to the Court and defendant in the hearing on the Motion for Preliminary Injunction.

40. Defendant's course of conduct prior to and following the Preliminary Injunction hearing reveals a calculated and deliberate intent to trade upon plaintiffs' valuable reputation and goodwill by staying as close as possible to plaintiffs' SCANDIA DOWN SHOPS Goose Logo trademark.

41. Because of defendant's use of the DOWN SHOPPES Goose Logo identified above:

(a) Customers have mistakenly telephoned plaintiffs' stores inquiring about unfilled orders placed with defendant's stores.

(b) Customers have mistakenly complained to plaintiffs' stores about merchandise purchased from defendant's stores.

(c) Customers have mistakenly entered plaintiffs' stores believing plaintiffs' stores to be affiliated with defendant's stores.

(d) Customers have mistakenly entered plaintiffs' stores inquiring about sales advertised by defendant.

(e) Customers have seen defendant's advertisements and mistakenly believed them to be plaintiffs' advertisements.

42. Defendant's use of the ORIGINAL DOWN SHOPPES and DOWN SHOPPES Goose Logos, which perpetuates the distinctive features of defendant's THE DOWN SHOPPE Goose Logo, is likely to cause confusion with plaintiffs.

### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

2. Plaintiffs' SCANDIA DOWN SHOPS Goose Logo is a suggestive trademark entitled to protection without proof of secondary meaning. Moreover, plaintiffs' SCANDIA DOWN SHOPS Goose Logo has acquired secondary meaning by virtue of its extensive advertising and sales and consumer perception. *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 36 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

3. It is irrelevant whether defendant's product is inferior to plaintiffs' product. The important factor is that plaintiffs' reputation is in the hands of defendant and defendant should not be able to control the public's attitude toward plaintiffs' *James Burrough Ltd. v. Sign of the Beefeater*, 541 F.2d 266 (1976), *later app.* 572 F.2d 574 (7th Cir. 1978).

4. The test for determining false designation of origin and unfair competition under 15 U.S.C. 1125(a), state statutes and the common law is likelihood of confusion. *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356 (7th Cir. 1965).

5. The test for trademark infringement and unfair competition under Illinois law is likelihood of confusion. *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 26 Ill.App.3d 814, 327 N.E.2d 242 (Ill.App. 1975).

6. The test of likelihood of confusion applies under the Uniform Deceptive Trade Practices Act, (Ill.Rev.Stat., Ch. 121-1/2, §§311-313). *Bonner v. Westbound Records, Inc.*, 49 Ill.App.3d 543, 364 N.E.2d 570 (Ill.App. 1977).

7. In resolving the issue of likelihood of confusion, the courts have developed numerous factors to be considered. No one of these factors alone is normally decisive, but all must be considered together. In *Helene Curtis Industries, Inc. v. Church & Dwight Co.*, 560 F.2d 1325 (7th Cir. 1977), the Court set forth a list of the factors to be considered, at p. 1330:

In determining "likelihood of confusion" several factors are important: 'the degree of similarity between the marks in appearance and suggestion; the similarity of the products for which the names is used; the area and manner of concurrent use; the degree of care likely to be exercised by consumers; the strength of the complainant's mark; actual confusion; and an intent on the part of the alleged infringer to palm off his products as those of another.' *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 705 (2 Cir. 1970), cert. denied, 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971).

To the same effect is *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 381 (7th Cir. 1976).

8. Since the test to be applied is likelihood of confusion, evidence of actual confusion is not necessary. *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609 (7th Cir. 1965).

9. Because of the recognized difficulty in obtaining evidence of actual confusion, even a small amount of such evidence is entitled to substantial weight. In *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609 (7th Cir. 1965), the Court held, at pp. 611-612:

Likelihood of confusion can be proved without any evidence of actual confusion, *Keller Products, Inc. v. Rubber Linings Corp.*, 213 F.2d 382, 386, 41 A.L.R.2d 1108 (7th Cir. 1954); *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 205 F.2d 921, 925 (7th Cir.), cert. denied, 346 U.S. 886, 74 S.Ct. 138, 98 L.Ed. 391 (1953), and since reliable evidence of actual confusion is difficult to obtain in trademark and unfair competition cases, any such evidence is substantial evidence of likelihood of confusion. *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 761 (2d Cir. 1960).

To the same effect are *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 383 (7th Cir. 1976); and *Helene Curtis Industries, Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977).

10. In determining the similarity of trademarks, the test is not a side-by-side comparison at which slight differences in display or lettering can be noted, but a consideration of the similarities presented to the consumer when faced with the marks individually. *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 382 (7th Cir. 1976).

11. Effective relief pursuant to an injunction order requires the infringer to choose a distinctly different mark and not try to stay as close as possible to the infringed mark. *Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, F.2d 434, 436 (7th Cir. 1954).

12. An injunction barring the use of plaintiffs' trademark is also a bar to the use of any trademark in close imitation or resemblance to the trademark. *World's Finest Chocolate, Inc. v. World Candies, Inc.*, 409 F. Supp. 840, 844 (N.D.Ill. 1976), aff'd, 559 F.2d 1226 (7th Cir. 1977); *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353, 354 (6th Cir. 1930).

13. Defendant's use of the THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES and DOWN SHOPPES Goose

Logos as shown in paragraphs 21, 32 and 35 herein are likely to be confused with plaintiffs' SCANDIA DOWN SHOPS Goose Logo. *Screw Machine Tool Company v. Slater Tool and Engineering Corporation*, 480 F.2d 1042 (6th Cir. 1973).

14. Defendant's use of its THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES and DOWN SHOPPES Goose Logos as shown in paragraphs 21, 32 and 35 herein is a deliberate and willful attempt to profit from plaintiffs' reputation.

15. Defendant's willful infringement of plaintiffs' SCANDIA DOWN SHOPS Goose Logo makes this an "exceptional case" and entitles plaintiffs to a recovery of their attorneys fees in connection with this action in accordance with 15 U.S.C. 1117. *Armstrong Cork Co. v. Armstrong Plastic Covers Co.*, 434 F. Supp. 860 (D.C.Mo. 1977); *Amana Soc. v. Gemeinde Brau, Inc.*, 417 F. Supp. 310 (D.C. Iowa 1976) *aff'd*, 557 F.2d 638 (8th Cir. 1976), *cert. denied*, 434 U.S. 967 (1977).

16. Defendants' willful infringement of plaintiffs' SCANDIA DOWN SHOPS Goose Logo which resulted in actual confusion entitles plaintiffs to an accounting of defendants' profits incurred in connection with its use of its THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES and DOWN SHOPPES Goose Logos as shown in paragraphs 21, 32 and 35 herein and any colorable imitations thereof. *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968); *Maltina Corp. v. Cawy Bottling Co., Inc.*, 613 F.2d 582, 585 (5th Cir. 1980).

17. To determine the amount of recoverable profits in the instant case, defendants shall, at a subsequent hearing, disclose the amount of sales of each product wrongfully sold under its THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES and DOWN SHOPPES Goose Logos as shown in Paragraphs 21, 32 and 35 herein. *Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Co.*, 316 U.S. 203, 205-207 (1942); *L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, 277 U.S. 97, 99-100 (1928); *Wolfe v. National Lead Company*, 272 F.2d 867, 970-73 (9th Cir. 1959).

## FINAL JUDGMENT

1. Defendant, its agents, servants, employees and attorneys, and those persons in active concert or participation with defendant be enjoined and restrained permanently from using in advertising, promotion or sale of bedding and related linen products THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES or DOWN SHOPPES Goose Logos displayed in paragraphs 21, 32 and 35 herein or any colorable imitations thereof which are likely to be mistaken or confused with Scandia's DOWN SHOPS name and SCANDIA DOWN SHOPS Goose Logo trademark.

2. That all labels, signs, prints, packages, wrappers, stationery and advertisements in the possession, custody or control of defendants, and all means of making the same, which might, if used, violate the injunction herein granted, be delivered up and destroyed, as this Court shall direct.

3. Defendants be required to account for and pay over to plaintiffs all profits wrongfully derived by defendant from its use of THE DOWN SHOPPE, ORIGINAL DOWN SHOPPES, and DOWN SHOPPES Goose Logos and any colorable imitations thereof.

4. Defendants be required to pay to plaintiffs the costs of this action, together with plaintiffs' reasonable attorneys' fees and disbursements incurred herein as provided in 15 U.S.C. 1117 and Ill.Rev.Stat.Ch. 121 1/2 §270(a) and §313.

PATTISHALL, McAULIFFE  
& HOFSTETTER

By \_\_\_\_\_  
Jeremiah D. McAuliffe  
Edward G. Wierzbicki  
33 West Monroe Street  
Chicago, Illinois 60603  
Telephone: (312) 641-1500  
Attorneys for Plaintiffs



**APPENDIX D**  
**IN THE UNITED STATES DISTRICT COURT**  
**For The Northern District of Illinois**

SCANDIA DOWN CORPORATION,  
 a California corporation, and  
 GOOSE DOWN, INC.,  
 an Illinois corporation,

*Plaintiffs,*

v.

EUROQUILT, INC.,  
 a New Jersey corporation,

*Defendant.*

Civil Action  
 No. 82 C. 5491  
 Honorable  
 Susan Getzendanner

**PLAINTIFFS' REPLY BRIEF**  
**IN SUPPORT OF ITS MOTION**  
**FOR PRELIMINARY INJUNCTION**

**I. STATEMENT**

Defendant's brief and the supporting affidavit of Monte Dow contain a serious admitted error regarding defendant's claim of first use of THE DOWN SHOPPE Goose Logo. See Dow affidavit ¶¶ 4, 9. Although the brief and the affidavit claim defendant's THE DOWN SHOPPE Goose Logo was first used in 1974, defendant's counsel admitted to plaintiffs' counsel at the pretrial hearing that defendant's first use of THE DOWN SHOPPE Goose Logo occurred in March, 1982. Accordingly, as set forth in the Preliminary Pre-Trial Order, defendant only claims use of THE DOWN SHOPPE since 1974.<sup>1</sup>

<sup>1</sup> Defendant's claim that it has used THE DOWN SHOPPE since 1974 is not supported by any proof of such use prior to March, 1982 in its brief or the Dow affidavit. However, use of THE DOWN SHOPPE alone since 1974 does not aid defendant since the only trademark to be considered on plaintiffs' motion is defendant's THE DOWN SHOPPE Goose Logo.

Because of the Dow affidavit's misrepresentation regarding the important issue of priority, the veracity and reliability of the entire affidavit must be seriously questioned. Plaintiffs' Complaint (p.4) and Memorandum (p.3) clearly identify the trademark being challenged by plaintiffs. Mr. Dow, the founder and managing director of defendant certainly must know the true facts regarding the date of first use of its trademark.

Because many of defendant's arguments are based upon the misrepresentation regarding priority of use, this Court must review defendant's brief with the understanding that there is no dispute that plaintiff Scandia used its SCANDIA DOWN SHOPS Goose Logo prior to defendant's use of THE DOWN SHOPPE Goose Logo. Plaintiff clearly has priority of use since it began selling goods under the SCANDIA DOWN SHOPS Goose Logo by mail throughout the United States, including the state of Illinois, in 1974, while plaintiff's first use of THE DOWN SHOPPE Goose Logo occurred in March, 1982.

Beyond the actual misrepresentation in its brief and affidavit, defendant fails to realize that the only trademark being challenged on plaintiffs' motion is its THE DOWN SHOPPE Goose Logo. Defendant attempts to obscure this limited issue by separating the aforesaid trademark into the various elements of (1) THE DOWN SHOPPE, (2) the depiction of a goose and (3) the typeface. This analysis is improper and irrelevant since the overall appearance of the trademark must be considered in the analysis of priority of use and likelihood of confusion. *Exxon Corp. v. Texas Motor Exchange of Houston*, 628 F.2d 500, 505 (5th Cir. 1980).

Defendant's claim that it used a typeface known as Souvenir Bold prior to plaintiff is also a subterfuge. Once again, the issue before this Court is the limited question of whether or not defendant should be enjoined from using THE DOWN SHOPPE Goose Logo. Since it is undisputed that plaintiff

Scandia has priority of use of its SCANDIA DOWN SHOPS Goose Logo, the issue of priority of use of any particular typeface apart from the subject trademark is irrelevant to plaintiff's motion.

\* \* \*

[48]

**APPENDIX E**  
IN THE UNITED STATES DISTRICT COURT  
Northern District of Illinois  
Eastern Division

SCANDIA DOWN CORPORATION, a California corporation, and GOOSE DOWN, INC., an Illinois corporation,

*Plaintiffs,*

vs.

EUROQUILT, INC.,  
a New Jersey corporation,

*Defendant.*

Docket No. 82 C 5491  
Chicago, Illinois  
Friday, October 28, 1983  
1:30 o'clock p.m.

**TRANSCRIPT OF TRIAL**  
**BEFORE THE HONORABLE SUSAN GETZENDANNER**  
**APPEARANCES:**

For the Plaintiffs: PATTISHALL, McAULIFFE  
& HOFSTETTER  
33 West Monroe Street  
Chicago, Illinois 60603  
BY: MR. EDWARD G. WIERZBICKI  
MR. JEREMIAH D. McAULIFFE

For Defendant Pro Se: MR. MONTE DOW  
461 Route 46 West  
Fairfield, New Jersey 07006

Court Reporter: MS. MAELLEN E. PITTMAN  
219 South Dearborn Street  
Chicago, Illinois 60604  
312/435-5576

[49-50]

\* \* \* \*

THE COURT: All right. Let's proceed.

MR. McAULIFFE: If I may, your Honor, may I? Maybe we can give this a little more perspective by way of clarification.

What the plaintiff is arguing against are these uses of these three logos that the defendant has used. We are not saying that the defendant is prohibited or could be prohibited from using The Down Shoppe in a descriptive way, as anybody is free to use it. Indeed, the defendant has used Continental Down Shoppe. We don't object to that kind of use at all.

What we are talking about is the effort on the part of the defendant to claim that he has an exclusive right to the use of The Down Shoppe as a mark or trade style exclusively as to him against others.

We admit, and I think the defendant has even stated himself, that when he is talking—that the industry recognizes Down Shoppes, A Down Shoppe, Continental Down Shoppe is a down shop, if you want to call it that. We are Scandia Down Shop.

So we are not—I want the Court to understand we don't pretend to be over-reaching what we think our rights are in this case. We don't believe that the defendant has any right to The Down Shoppe, as would we. But we do say Scandia Down Shop and our composite trade style and logo is a fanciful combination to which we have exclusive rights, or at least we claim exclusive rights, and that the defendant is free to use another trade style or logo so long as it doesn't cause confusion with us, as he has in the past, Continental Down Shoppe, to which we don't complain. And beyond that, that if he wants to use Down Shoppe in a descriptive way, as he has, obviously he is free to do that.

\* \* \*

\* \* \* \*

# § 1125. False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

\* \* \* \*

## (d) Form and scope of injunction or restraining order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.



# **OPPOSITION BRIEF**

85-1088 (2)

Supreme Court, U.S.  
FILED

MAR 31 1986

JOSEPH E. SPANIOL, JR.  
CLERK

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

---

EUROQUILT, INC., a New Jersey corporation,

*Petitioner,*

v.

SCANDIA DOWN CORPORATION,  
a California corporation, and  
GOOSE DOWN, INC., an Illinois corporation,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

BRIEF OF SCANDIA DOWN CORPORATION  
AND  
GOOSE DOWN, INC.  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

---

Jeremiah D. McAuliffe  
Edward G. Wierzbicki  
**PATTISHALL, McAULIFFE &  
HOFSTETTER**

33 West Monroe Street  
Chicago, Illinois 60603  
(312) 641-1500  
*Attorneys for Respondents*

15 pp

### QUESTIONS PRESENTED

1. Is a trial court determination that there is a likelihood of confusion between two trademarks a question of fact, reversible only if clearly erroneous?

2. Is a finding of contempt of a preliminary injunction order proper in a trademark infringement action where the contempt is based upon an order which enjoins a colorable imitation of the trademark enjoined by the preliminary injunction?



## TABLE OF CONTENTS

	PAGE
Questions Presented .....	i
Table of Contents .....	ii
Table of Authorities .....	iii
Statement of the Case .....	1
Reasons for Denying the Petition .....	4
Conclusion .....	10

## TABLE OF AUTHORITIES

Cases	PAGE
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ...	6
<i>Fleischmann Distilling Corporation v. Maier Brewing Company</i> , 314 F.2d 149 (9th Cir.), cert. denied 374 U.S. 830 (1963) .....	6
<i>Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.</i> , 670 F.2d 642 (6th Cir.), cert. denied 459 U.S. 916 (1982) .....	5, 7
<i>Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha</i> , 754 F.2d 591 (5th Cir. 1985) .....	4, 6
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters</i> , 415 U.S. 423 (1974) .....	9
<i>Helene Curtis Industries, Inc. v. Church &amp; Dwight Co.</i> , 560 F.2d 1325 (7th Cir. 1977), cert. denied 434 U.S. 1070 (1978) .....	5
<i>Hot Shot Quality Products, Inc. v. Sifers Chemicals, Inc.</i> , 452 F.2d 1080 (10th Cir. 1971) .....	5, 6
<i>Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.</i> , 716 F.2d 833 (11th Cir. 1983) .....	5, 7
<i>Kimberly-Clark Corp. v. H. Douglas Enterprises</i> , 774 F.2d 1144 (Fed. Cir. 1985) .....	5, 7, 8
<i>Lindy Pen Co., Inc. v. Bic Pen Corp.</i> , 725 F.2d 1240 (9th Cir. 1984) cert. denied — U.S. —, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985) .....	5, 7, 8
<i>Pizzeria Uno Corp. v. Temple</i> , 747 F.2d 1522 (4th Cir. 1984) .....	4, 6, 8
<i>Plus Products v. Plus Discount Foods, Inc.</i> , 722 F.2d 999 (2nd Cir. 1983) .....	4, 7
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982) .....	4, 7, 8
<i>Purolator, Inc. v. EFRA Distributors, Inc.</i> , 687 F.2d 554 (1st Cir. 1982) .....	4, 6
<i>Scott Paper Co. v. Scott's Liquid Gold, Inc.</i> , 589 F.2d 1225 (3rd Cir. 1978) .....	4, 7, 8

<i>Cases</i>	PAGE
<i>Tisch Hotels, Inc. v. Americana Inn, Inc.</i> , 350 F.2d 609 (7th Cir. 1965) .....	6
<i>WSM, Inc. v. Hilton</i> , 724 F.2d 1320 (8th Cir. 1984) ..	5, 6

#### Statutes

Federal Rule of Civil Procedure 52(a) .....	6, 7
Federal Rule of Civil Procedure 65(d) .....	8, 9

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1985

EUROQUILT, INC., a New Jersey corporation,

*Petitioner,*

v.

SCANDIA DOWN CORPORATION,  
a California corporation, and  
GOOSE DOWN, INC., an Illinois corporation,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

BRIEF OF SCANDIA DOWN CORPORATION  
AND  
GOOSE DOWN, INC.  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

#### STATEMENT OF THE CASE

This is an action for trademark infringement, unfair competition and dilution in which the District Court permanently enjoined petitioner's ("Euroquilt") use of four successive trademarks found to infringe respondents' ("Scandia") SCANDIA DOWN SHOPS Goose Logo trademark



when used on comforters and related bedding products.<sup>1</sup> Euroquilt is a direct competitor of Scandia in the same business in the same geographic area(2a).

On November 8, 1982, the District Court issued a preliminary injunction enjoining Euroquilt's use of THE DOWN SHOPPE Goose Logo trademark(2a):



The order of preliminary injunction also enjoined Euroquilt's use of any colorable imitation of its THE DOWN SHOPPE Goose Logo trademark. Logo II (24a).

Euroquilt ceased use of the enjoined Logo II, and adopted and commenced using the following logo(3a):



<sup>1</sup> Respondents have no parent companies, subsidiaries or affiliates.

Scandia objected almost immediately to Logo III, whereupon Euroquilt commenced using the following logo(3a):



Scandia charged that Logo IV was a violation of the preliminary injunction (3a). After a finding of likelihood of confusion between Logo I and Logo IV, a Magistrate recommended on September 2, 1983 that Euroquilt be held in contempt of the order of preliminary injunction (3a).

While the Magistrate's recommendation of contempt was pending before the District Court, a trial was held on October 28, 1983(3a). Euroquilt's president, Monte Dow, appeared *pro se* on behalf of Euroquilt(4a). The evidence at trial consisted of the record developed at the hearings on Scandia's motion for preliminary injunction and motion for contempt. No new evidence or testimony was introduced by the parties.

On February 17, 1984, following the trial, but prior to judgment and prior to approval of the Magistrate's Report on Contempt, Scandia brought a second motion for contempt based upon Euroquilt's use of the following logo(3a):



In an opinion dated May 31, 1984, the District Court found Scandia and Euroquilt used their respective logos for the same goods in direct competition in the same areas (40a); that Scandia's logo was a suggestive mark which had acquired secondary meaning (45a); that Euroquilt's use of its four



logos caused substantial actual confusion (27a, 34a, 41a, 42a, 48a); and that Euroquilt intended to infringe Scandia's logo (13a, 33a, 48a). Based upon these findings, the District Court found Euroquilt's use of Logos II, III, IV and V confusingly similar with Scandia's Logo I, and permanently enjoined and restrained their use, and it further found Euroquilt's use of Logos IV and V to be in contempt of the District Court's order of preliminary injunction (28a, 29a). The Court of Appeals affirmed the District Court in all respects. 772 F.2d 1423.

### REASONS FOR DENYING THE PETITION

#### I. The Validity Of The Standard Of Review For Likelihood Of Confusion Need Not Be Considered In This Case.

Euroquilt argues there is a split in the Courts of Appeals as to whether the ultimate issue of likelihood of confusion in a trademark infringement action is a question of fact reversible only if clearly erroneous or is a question of law. This Court need not consider this question because a resolution in Euroquilt's favor will not alter the judgment of the Court of Appeals and, moreover, the perceived conflict has been resolved by this Court's decision in *Pullman-Standard v. Swint*, 465 U.S. 273 (1982).

#### A. This Is Not The Proper Case In Which To Resolve A Potential Conflict In The Courts Of Appeals

The Courts of Appeals for all Circuits analyze the ultimate issue of likelihood of confusion in terms of various underlying factors. Although the Courts of Appeals differ slightly as to the nature and number of underlying factors, all of the Courts of Appeals are in agreement that the factors considered are issues of fact reversible only if clearly erroneous.<sup>2</sup>

<sup>2</sup>See, e.g., *Purolator, Inc. v. EFRA Distributors, Inc.*, 687 F.2d 554, 559 (1st Cir. 1982); *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1004-05 (2d Cir. 1983); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229-30 (3d Cir. 1978); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526, 1536 (4th Cir. 1984); *Fuji Photo Film v.*

(footnote continued on next page)

In the Seventh Circuit, the factors to be considered in deciding likelihood of confusion are:

- (1) The degree of similarity between the marks in appearance and suggestion.
- (2) The similarity of the products.
- (3) The area and manner of concurrent use.
- (4) The degree of care likely to be exercised by the consumer.
- (5) The strength of the complainant's mark.
- (6) Actual confusion.
- (7) The intent of the alleged infringer.

See *Helene Curtis Industries, Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977), *cert. denied* 434 U.S. 1070 (1978). Here, the District Court made findings of fact in Scandia's favor for six of the seven factors of likelihood of confusion and made no mention of the seventh factor, the degree of care likely to be exercised by the consumer. The District Court found Scandia's trademark to be a suggestive mark which had acquired secondary meaning and that Scandia and Euroquilt were competitors in the same business in the same geographic areas. The District Court also found

(footnote continued from preceding page)

*Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 595 (5th Cir. 1985); *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 651 (6th Cir. 1982), *cert. denied* 459 U.S. 916 (1982); *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1329 (8th Cir. 1984); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1243 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 955, 83 L.Ed. 2d 962 (1985); *Hot Shot Quality Products, Inc. v. Sifers Chemicals, Inc.*, 452 F.2d 1080, 1981 (10th Cir. 1971); *Jellibean, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 839-40 (11th Cir. 1983); *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 1166 (Fed. Cir. 1985).

the trademarks of the parties to be similar.<sup>3</sup> Significantly, the District Court found the existence of substantial actual confusion (e.g. over 180 incidents in one five month period) and an intent by Euroquilt to willfully infringe Scandia's trademark. Such findings of actual confusion and an intent to infringe constitute strong evidence of likelihood of confusion. *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 611-612 (7th Cir. 1965); *Fleischmann Distilling Corporation v. Maier Brewing Company*, 314 F.2d 149, 158 (9th Cir.), *cert. denied* 374 U.S. 830 (1963). All of the findings of the District Court were affirmed by the Court of Appeals.

Thus, a review of the District Court's findings regarding the factors of likelihood of confusion shows Euroquilt could not prevail even if the ultimate finding of likelihood of confusion were reviewed as a legal conclusion because there is no dispute regarding the facts supporting the finding of likelihood of confusion.

**B. The Potential Conflict In The Courts Of Appeals Can Be Resolved In Those Courts By The Decision In *Pullman-Standard v. Swint*, 465 U.S. 273 (1982)**

The Court of Appeals below held the District Court's finding of likelihood of confusion to be a question of fact reversible only if clearly erroneous. The majority of the Courts of Appeals regard likelihood of confusion as an issue of fact reviewable under the clearly erroneous standard. See, e.g., *Purolator, Inc. v. EFRA Distributors, Inc.*, 687 F.2d 554, 559 (1st Cir. 1982); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526, 1536 (4th Cir. 1984); *Fuji Photo Film v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 595 (5th Cir. 1985); *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1329 (8th Cir. 1984); *Hot*

<sup>3</sup>To the extent a comparison of the parties' trademarks is based upon documentary evidence or upon an examination of the marks, this Court's holding in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) reaffirms that the clearly erroneous standard of Fed. Rule Civ. Pro. 52(a) applies to such findings.

*Shot Quality Products, Inc. v. Sifers Chemicals, Inc.*, 452 F.2d 1080, 1081 (10th Cir. 1971); *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 839-40 (11th Cir. 1983).

To the extent there is a conflict in the Courts of Appeals whether likelihood of confusion is a question of fact or of law, that conflict was resolved by this Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).<sup>4</sup> In *Swint*, this Court reversed the Court of Appeals holding that a finding of discrimination *vel non*, based on facts properly found, was not subject to the clearly erroneous rule because it was a finding regarding the ultimate issue for resolution. This Court held Fed. Rule Civ. Pro. 52(a) does not permit any distinction between "ordinary" and "ultimate" facts.

The ruling in *Swint* is decisive for the issue raised by Euroquilt because the Courts of Appeals that have adopted the position that the issue of likelihood of confusion is a legal conclusion not subject to the clearly erroneous rule all discussed the issue either in terms of an "ultimate" conclusion or as an inference from foundational facts. See, e.g., *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1004-05 (2d Cir. 1983) (likelihood of confusion as "the ultimate conclusion"); *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 1166 (Fed. Cir. 1985) (likelihood of confusion as "the ultimate conclusion"); *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 651 (6th Cir. 1982) *cert. denied* 459 U.S. 916 (1982) (likelihood of confusion as the "ultimate determination" and the elements of likelihood of

<sup>4</sup>Five Courts of Appeals have adopted a position that likelihood of confusion is a question of law. *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1004-05 (2d Cir. 1983); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229-30 (3d Cir. 1978); *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 651 (6th Cir. 1982), *cert. denied* 459 U.S. 916 (1982); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1243 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985); *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 1166 (Fed. Cir. 1985).

confusion as “foundational facts”); *Scott Paper Co. v. Scott’s Liquid Gold, Inc.*, 589 F.2d 1225, 1229-30 (3d Cir. 1978) (elements of likelihood of confusion as “basic facts”); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1243 (9th Cir. 1984), *cert. denied* \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985) (elements of likelihood of confusion as “foundational facts” and “subsidiary factors”). For example, in *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 1146 (Fed. Cir. 1985) the Federal Circuit held, as did the Court of Appeals in *Pullman-Standard v. Swint*, that an ultimate issue in a case is not subject to the clearly erroneous rule:

Because the ultimate conclusion of likelihood of confusion *vel non*—based on the facts properly found—is a legal matter, we must decide that question for ourselves.

As recognized by the Court of Appeals here (7a), the Federal Circuit in *Kimberly-Clark* failed to discuss the impact of *Swint* on its holding. The one Court of Appeals that has considered the impact of *Swint* in a trademark infringement case rejected the position of the Courts of Appeals for the Sixth and Ninth Circuits that likelihood of confusion was a question of law. *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984). The Court held that *Swint* established the principle that all findings in a trademark infringement case were to be reviewed under the clearly erroneous rule. 747 F.2d at 1526. Once the Federal Circuit and the other Courts of Appeals consider the impact of *Swint*, those Courts have the opportunity to resolve the conflict by treating the “ultimate” issue of likelihood of confusion as an issue of fact subject to the clearly erroneous rule. Since these Courts of Appeals have not considered *Swint*, this Court should not entertain the question, particularly in a case where resolution of the issue will not change the result below.

## II. The Second Finding Of Contempt Is Not A Proper Question For Review By This Court

Euroquilt’s second ground for granting its petition does not involve any conflict in the Courts of Appeals and it does

not involve a question of importance or error by the courts below. Euroquilt’s request for guidance regarding the application of Fed. Rule Civ. Pro. 65(d) is merely a request for this Court to review the correctness of the District Court’s finding of contempt and its affirmance by the Court of Appeals.

Fed. Rule Civ. Pro. 65(d) requires fair and precisely drawn notice of what the injunction prohibits in the injunction order. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423 (1974). Euroquilt claims there was no way it could know in advance what logo would be prohibited following the entry of preliminary injunction. Euroquilt’s claim of lack of fair notice, however, is based upon its interpretation of arguments made on the motion for preliminary injunction and not the order of preliminary injunction.

The preliminary injunction order was clear in that it enjoined Euroquilt’s use of its Logo II “or any colorable imitation thereof” (24a). The words “colorable imitation” are a term of legal art and clearly understood (41a). Moreover, the reference point for the injunction is Euroquilt’s own (Logo II) THE DOWN SHOPPE Goose Logo. Euroquilt clearly was on notice its use of THE DOWN SHOPPE (Logo V) might be prohibited by the injunction as a colorable imitation of its THE DOWN SHOPPE Goose Logo (Logo II).

Euroquilt had the right to seek clarification or modification of the preliminary injunction order. Euroquilt, however, chose not to seek any clarification or modification of the order and did not ask the District Court whether Logos IV and V would be permitted (14a). As the Court of Appeals stated, Euroquilt has only itself to blame for the contempt rulings (14a).



**CONCLUSION**

For the foregoing reasons, respondents request the petition for writ of certiorari be denied.

Respectfully submitted,  
PATTISHALL, MCAULIFFE & HOFSTETTER

By \_\_\_\_\_  
Jeremiah D. McAuliffe  
Edward G. Wierzbicki  
33 West Monroe Street  
Chicago, Illinois 60603  
(312) 641-1500

# REPLY BRIEF

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

EUROQUILT, INC., a New Jersey corporation,  
*Petitioner,*

v.

SCANDIA DOWN CORPORATION,  
a California corporation, and  
GOOSE DOWN, INC., an Illinois corporation,  
*Respondents.*

**REPLY BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

CARL E. MOORE, JR.  
DOUGLASS C. HOCHSTETLER  
MARSHALL, O'TOOLE, GERSTEIN,  
MURRAY & BICKNELL  
Two First National Plaza  
Chicago, Illinois 60603  
(312) 346-5750

*Attorneys for Petitioner Euroquilt, Inc.*



## TABLE OF CONTENTS

	PAGE
<b>Arguments:</b>	
I. Respondent wrongly contends that <i>Pullman-Standard v. Swint</i> is dispositive of the circuit conflict.....	1
II. Two very recent circuit decisions illustrate the need for Supreme Court intervention .....	3
III. This case is an excellent vehicle for resolving the circuit conflict.....	4
IV. There is clear tension between the Federal Circuit and the Court below concerning F. R. Civ. P. 65(d)'s requirement of fair notice .....	6

## TABLE OF CITATIONS

	PAGE
<b>Cases Cited:</b>	
<i>Best &amp; Co. v. Miller</i> , 167 F.2d 374 (2nd Cir) cert. denied 335 U.S. 818 (1948) .....	5
<i>California Artificial Stone Paving Co. v. Molitor</i> , 113 U.S. 609 (1885) .....	6
<i>Dawson Chemical Co. v. Rohm &amp; Haas Co.</i> , 448 U.S. 176 (1980) .....	6
<i>Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.</i> , 459 U.S. 916 (1982) .....	2
<i>Falcon Rice Mill, Inc. v. Community Rice Mill, Inc.</i> , 725 F.2d 336 (5th Cir. 1984) .....	5
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters</i> , 415 U.S. 423 (1974) .....	7
<i>Henri's Food Products, Inc. v. Kraft, Inc.</i> , 717 F.2d 352 (7th Cir. 1983) .....	5
<i>J.M. Huber Corp. v. Lowery Wellheads, Inc.</i> , 778 F.2d 1467 (10th Cir. 1985) .....	3
<i>KSM Fastening Systems, Inc. v. H.A. Jones Company, Inc.</i> , 776 F.2d 1522 (Fed. Cir. 1985).....	6, 7
<i>Kwik-Site Corp. v. Clear View Mfg. Co., Inc.</i> , 758 F.2d 167 (6th Cir. 1985) .....	2, 5
<i>Levi Strauss &amp; Co. v. Blue Bell, Inc.</i> , 778 F.2d 1352 (9th Cir. 1985) .....	3
<i>Litton Systems, Inc. v. Whirlpool Corp.</i> , 728 F.2d 1423 (Fed. Cir. 1984) .....	4, 5, 7
<i>Piper Aircraft Corp. v. Wag-Aero, Inc.</i> , 741 F.2d 925 (7th Cir. 1984) .....	4
<i>Plus Products v. Plus Discount Foods, Inc.</i> , 722 F.2d 999 (2nd Cir. 1983).....	3
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982) ...	1, 2
<i>Security Center, Ltd. v. First National Security Centers</i> , 750 F.2d 1295 (5th Cir. 1985) .....	2
<b>Statutes Cited:</b>	
Federal Rule of Civil Procedure 65(d).....	6, 7

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1985

EUROQUILT, INC., a New Jersey corporation,  
*Petitioner,*

v.

SCANDIA DOWN CORPORATION,  
 a California corporation, and  
 GOOSE DOWN, INC., an Illinois corporation,  
*Respondents.*

REPLY BRIEF IN SUPPORT OF  
 PETITION FOR A WRIT OF CERTIORARI TO THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE SEVENTH CIRCUIT

Petitioner Euroquilt, Inc. respectfully submits this reply brief in support of its petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit.

## ARGUMENT

i. RESPONDENT WRONGLY CONTENDS THAT  
*PULLMAN-STANDARD v. SWINT* IS DISPOSITIVE  
 OF THE CIRCUIT CONFLICT.

Respondent Scandia contends that this Court's opinion in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) is dispositive of the issue of whether "likelihood of confusion" in a trademark

infringement action is a finding of fact or conclusion of law. Indeed, Scandia goes so far as to suggest that "[o]nce the Federal Circuit and the other Courts of Appeals consider the impact of *Swint*, those Courts have the opportunity to resolve the conflict ...". Respondents' Brief in Opposition at 8 ("Respondents' Brief").

Respondents' suggestion is specious. Mr. Justice White, who authored the Court's opinion in *Swint* in April of 1982, dissented in October of that year from the denial of certiorari in a case because it would have permitted the Court to resolve the very conflict that is presented here. See *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, 459 U.S. 916 (1982). It seems unlikely that Justice White would prescribe the remedy of court intervention for a self-healing conflict.

Contrary to Scandia's suggestion, the conflict has not arisen from the Courts of Appeals' misapprehension of *Swint*'s prohibition against distinguishing between "subsidiary facts" and "ultimate facts". See Respondents' Brief at 7-8. The conflict arises, as Mr. Justice White pointed out in his dissent in *Elby's Big Boy*, from a disagreement over whether likelihood of confusion is a question of fact, see, e.g. the Seventh Circuit's opinion below ("the question of likelihood of confusion is all fact and no law") (6a) or one of law, see, e.g., *Kwik-Site Corp. v. Clear View Mfg. Co., Inc.*, 758 F.2d 167, 178 (6th Cir. 1985) (the "determination of likelihood of confusion ... is a legal conclusion, not subject to the clearly erroneous standard"). If likelihood of confusion is a question of law, the clearly erroneous rule is manifestly inapplicable. See, e.g., *Swint*, 456 U.S. at 287 (Rule 52(a) does not apply to conclusions of law). The hard question, from which the conflict arises, is whether likelihood of confusion is properly characterized as a question of pure fact. Compare *Security Center, Ltd. v. First National Security Centers*, 750 F.2d 1295, 1297-98 n.3 (5th Cir. 1985) (In trademark cases, questions of law are constantly mixed up with the various questions of fact).

## II. TWO VERY RECENT CIRCUIT DECISIONS ILLUSTRATE THE NEED FOR SUPREME COURT INTERVENTION.

Two decisions published after the filing of Euroquilt's petition nicely illustrate why the question presented here is worthy of this Court's attention. In these cases, published within one week of each other, two Courts of Appeals reached diametrically opposed conclusions after reviewing pertinent decisions of their sister circuits.

In the earlier decision, the Tenth Circuit concluded that "there appears to be an evolving trend toward treating the fact finder's determination of the underlying factors as questions of fact, but treating the ultimate issue of 'likelihood of confusion' as a question of law". *J.M. Huber Corp. v. Lowery Wellheads, Inc.*, 778 F.2d 1467, 1471 (10th Cir. 1985). Among the cases cited by the *J.M. Huber* court as indicative of the "evolving trend" was the Second Circuit's decision in *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999 (2nd Cir. 1983).

In the later decision, the Ninth Circuit, sitting *en banc*, overruled its earlier decisions and held that a determination of likelihood of confusion would henceforth be reviewed under the clearly erroneous standard. See *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1356 (1985). The Ninth Circuit apparently believed in *Levi Strauss* that it was merely bringing itself into line with the predominate views of other circuits, including the Second.<sup>1</sup> See *id.* at 1356 n.6.

<sup>1</sup> The Ninth Circuit read the Second Circuit's precedents as having held that likelihood of confusion was generally reversible only for clear error. See *id.* In fact, as correctly noted by the Tenth Circuit, the Second Circuit position is exactly to the contrary. See *Plus Products*, 722 F.2d at 1004-05. (The trial court's "determination of likelihood of confusion based on the balancing of or relative weight given to each of its findings is a legal conclusion which is reviewable by this court as a matter of law").



The confusion suggested by these two recent decisions is understandable in view of the inconsistent language that has appeared even within individual circuits. Compare the Seventh Circuit's opinion below (6a) with *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 935 (7th Cir. 1984) (Court of Appeals affirms trial court finding of actual confusion as not "clearly erroneous" while affirming finding of likelihood of confusion as not "erroneous"). Euroquilt's respectfully suggests that the persistence of this issue coupled with the evident absence of clarity among lower court opinions warrants this Court's intervention.

### III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.

Scandia has urged this Court to deny certiorari because many of the findings of fact underlying the determination of likelihood of confusion are adverse to Euroquilt. Euroquilt offers three points in rebuttal.

First, the one factor identified by Scandia as not decided adversely to Euroquilt — the degree of care likely to be exercised by the consumer<sup>2</sup> — is extremely important. Since the Seventh Circuit's test for likelihood of confusion is whether an ordinary purchaser would likely be confused by the similarity of the two marks (8a), degree of care is critical to assessing the likelihood that an individual exercising ordinary care would buy a Euroquilt down comforter believing it to be

<sup>2</sup> No finding was made on this issue, although it almost certainly would have been resolved in Euroquilt's favor. Ordinary purchasers of expensive items like down comforters are expected to exercise a greater degree of care than purchasers of impulse items, thus lessening the likelihood of confusion. See *Litton Systems Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1446 (Fed. Cir. 1984). The omission may be explainable by the District Court's verbatim adoption of virtually all of Scandia's proposed conclusions of fact and law, right down to including a grammatical error (21a, last sentence).

Scandia's. See generally *Litton Systems*, 728 F.2d at 1446 and cases cited therein.

Second, the factors identified by Scandia are not an exclusive compendium; another factor present here which is important in the Seventh Circuit and elsewhere is the prominent display of competitors' names in their respective logos. See *Henri's Food Products, Inc. v. Kraft, Inc.*, 717 F.2d 352, 355-56 (7th Cir. 1983) (Presence of housemark in Henri's "Yogo-whip" lessens likelihood of confusion with Kraft "Miracle Whip"); See also *Best & Co. v. Miller*, 167 F.2d 374, 377 (2nd Cir), cert. denied 335 U.S. 818 (1948) (No likelihood of confusion between neighboring stores called "Liliputian Bazaar" and "Miller's Lilliputian Shoppe"). Indeed, two Courts of Appeals have identified such prominent display of a competitor's name as nearly dispositive by itself that a likelihood of confusion does not exist. See *Kwik-Site*, 758 F.2d at 178; *Litton Systems*, 728 F.2d at 1446-47.

Third, the clearly erroneous rule does not apply to those trial court findings on the likelihood of confusion factors which were reached by application of an incorrect legal standard. E.g. *Falcon Rice Mill, Inc. v. Community Rice Mill, Inc.*, 725 F.2d 336, 344 (5th Cir. 1984) (Wisdom, J.). One of Euroquilt's principal arguments before the Seventh Circuit was that several of the trial court's findings on these factors were infected by application of the incorrect legal standard. Consistent with its underlying assumption that "likelihood of confusion is all fact and no law", the Seventh Circuit rejected this argument. If this Court contradicts that assumption, these other findings would be subject to effective review.<sup>3</sup>

<sup>3</sup> For example, the District Court made no apparent effort to differentiate those instances of actual confusion that were due to the presence of the generic term "down shop(pe)" and those instances that were the result of confusion between the competing marks *en toto*. Under Seventh Circuit precedents only the latter would be

(Footnote continued on following page.)

To summarize Argument III, the final outcome of this litigation is not a foregone conclusion if the proper scope of appellate review is permitted.

#### IV. THERE IS CLEAR TENSION BETWEEN THE FEDERAL CIRCUIT AND THE COURT BELOW CONCERNING F. R. CIV. P. 65(d)'s REQUIREMENT OF FAIR NOTICE.

Scandia summarily dismisses the second question presented in this petition with the observation that there is no conflict in the Courts of Appeals and the issue involves neither a lower court error nor a question of importance. See Respondents' Brief at 8-9. Not surprisingly, Euroquilt does not agree.

"There is no direct conflict, but a number of decisions exhibit some tension ...". *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 n.4 (1980). As previously noted, see Euroquilt's petition at 15, the Seventh Circuit upheld a second finding of contempt against Euroquilt for using a logo that probably did not violate the injunction (15a). This approach is analytically inconsistent, if not in open conflict, with the Federal Circuit's opinion in *KSM Fastening Systems, Inc. v. H.A. Jones Company, Inc.*, 776 F.2d 1522, 1525-26 (1985) (Contempt is improper if there is a "fair ground of doubt" as to whether the injunction against infringement had been violated, citing *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609 (1885)).

The Seventh Circuit's proffered justification for its position was Euroquilt's "history [sic] as ... [a] contemnor" (15a), but the trial court made both findings of contempt in the same

(Footnote continued from preceding page.)

relevant to a determination of likelihood of confusion. See cases collected in Euroquilt's Petition for Certiorari at 10; See also Scandia's argument before the trial court (54a). ("We are not saying that the defendant is prohibited or could be prohibited from using The Down Shoppe in a descriptive way, as anybody is free to use it.")

opinion (4a). If the first finding of contempt had occurred prior in time to the second — and prior in time to Euroquilt's adoption of Logo V — the Seventh Circuit's approach might be unobjectionable. But where, as here, both contempt findings occurred simultaneously, Euroquilt was denied "fair and precisely drawn notice of what the injunction actually prohibits", *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 444 (1974), when Logo V was ruled contemptuous.

Scandia's argument that the words "colorable imitation" included in the injunction decree represent a clearly understood term of legal art, see Respondent's Brief at 9, wholly misses the mark because everybody before and during trial agreed that Logo V was *not* such a colorable imitation. In arguing for a preliminary injunction, Scandia explicitly denied any attempt to challenge Euroquilt's right to use "The Down Shoppe" (50a-51a). At trial, Scandia's attorney conceded that Euroquilt had a right to use "The Down Shoppe" (54a). Both the District Court and Court of Appeals strongly implied that Euroquilt would have been free to use "The Down Shoppe" but for the predicate first finding of contempt (15a).

The denial of fair notice that is the focus of this petition did not arise, therefore, from a defect in the wording of the decree itself, although the decree is perhaps not the ideal form model. Rather the denial of fair notice arose from the retroactive interpretation of the injunction's scope to include what had previously been sanctioned. This is a case, as Judge Nichols has written in a similar setting, where the lower court, having "thrown the book" at the infringer, "was so carried away by his indignation as to follow up the book with the paperweight and the inkwell", *Litton Systems*, 728 F.2d at 1446 n.1. Here the paperweight and inkwell were the second finding of contempt which both violated F.R. Civ. P. 65(d) and is in tension with the Federal Circuit's decision in *KSM Fastening Systems*.

### CONCLUSION

For the reasons stated herein and for the reasons stated in the petition, it is respectfully requested that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

CARL E. MOORE, JR.  
DOUGLASS C. HOCHSTETLER  
MARSHALL, O'TOOLE, GERSTEIN,  
MURRAY & BICKNELL  
Two First National Plaza  
Chicago, Illinois 60603  
(312) 346-5750

*Attorneys for Petitioner Euroquilt, Inc.*



**OPINION**

4

## SUPREME COURT OF THE UNITED STATES

EUROQUILT, INC., ETC. v. SCANDIA DOWN CORPORATION, ETC. AND GOOSE DOWN, INC., ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85-1038. Decided April 28, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

One of the questions presented by this case is whether, in a trademark infringement action under § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), a district court's finding of "likelihood of confusion" is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. As I have previously noted, the Courts of Appeals are divided on this question. *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (WHITE, J., dissenting from denial of certiorari). I would grant certiorari to resolve this conflict.

1 PP